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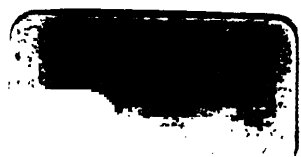
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AN

O. Howard
1842

ABRIDGMENT

OF THE

LAW OF NISI PRIUS.

VOL. II.

- | | |
|-----------------------------------|---------------------------------------|
| 8. DEBT. | 17. LIMITATIONS, STATUTES OF. |
| 9. DETINUE. | 18. MALICIOUS PROSECUTION. |
| 10. DISTRESS. | 19. PRACTICE IN TRIALS AT NISI PRIUS. |
| 11. EJECTMENT. | 20. REPLEVIN. |
| 12. EXECUTORS AND ADMINISTRATORS. | 21. SLANDER. |
| 13. FRAUDS, STATUTES AGAINST. | 22. TRESPASS. |
| 14. FRAUDULENT MISREPRESENTATION. | 23. TROVER. |
| 15. HUSBAND AND WIFE. | 24. WARRANTY. |
| 16. INSURANCE. | 25. WILLS. |
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BY

P. BRADY LEIGH, ESQ.,

OF THE INNER TEMPLE, BARRISTER AT LAW.

WITH NOTES AND REFERENCES TO THE LATEST AMERICAN CASES,

BY

GEORGE SHARSWOOD.

IN TWO VOLUMES.

PHILADELPHIA:

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CONTENTS.

VOL. II.

CHAPTER VIII.

OF THE ACTION OF DEBT.

SEC.	PAGE
I. When debt lies in general - - - - -	709
II. The declaration - - - - -	713
III. The pleadings - - - - -	714
IV. Debt for rent - - - - -	716
V. The declaration - - - - -	720
VI. The pleadings - - - - -	723
VII. Debt for double value - - - - -	726
VIII. Debt for double rent - - - - -	729
IX. Debt on bond - - - - -	730
X. The declaration - - - - -	760
XI. The pleadings - - - - -	767
XII. Debt on bail bond - - - - -	770
XIII. The declaration - - - - -	777
XIV. The pleadings - - - - -	779

CHAPTER IX.

DETINUE - - - - -	781
-------------------	-----

CHAPTER X.

DISTRESS.

I. Of the nature of a distress, and the causes for which it may be made	785
II. Who may distrain - - - - -	787
III. How a distress may be avoided - - - - -	792
IV. What may, and what may not be distrained - - - - -	794
V. In what place a distress should be made - - - - -	802
VI. In case of a fraudulent removal - - - - -	803
VII. At what time a distress may be taken - - - - -	805
VIII. How a distress should be made - - - - -	807
IX. How a distress should be disposed of - - - - -	809
X. Second distress - - - - -	813
XI. Rescous or pound breach - - - - -	814
XII. Remedy for a wrongful distress - - - - -	815

CHAPTER XI.

EJECTMENT.

SEC.	PAGE
I. Of the nature of an action of ejectment - - - -	819
II. For what things an ejectment will lie - - - -	823
III. Of the title necessary to support ejectment - - - -	882
IV. Who may bring ejectment - - - -	840
V. In what cases an actual entry must be made before ejectment - -	853
VI. Notice to quit - - - -	857
VII. The declaration - - - -	878
VIII. Service of the declaration - - - -	889
IX. Of the affidavit of service - - - -	899
X. Judgment by default - - - -	902
XI. Appearance of the defendant, and proceedings thereupon - -	905
XII. When the court will stay the proceedings - - - -	911
XIII. Of the proceedings under 1 G. IV, c. 87, where the tenant holds over	918
XIV. Of the evidence - - - -	921
XV. Of the trial, judgment, and execution - - - -	942
XVI. Cests - - - -	946
XVII. Writ of error - - - -	948
XVIII. Trespass for mesne profits - - - -	949

CHAPTER XII.

EXECUTORS AND ADMINISTRATORS.

I. Who may be an executor - - - -	955
II. Of an executor <i>de son tort</i> - - - -	957
III. Administrators - - - -	962
IV. Administration <i>cum testamento annexo</i> - - - -	963
V. Administration <i>de bonis non</i> - - - -	964
VI. Of limited administrations - - - -	965
VII. Of <i>bona notabilia</i> - - - -	968
VIII. Of the interest which an executor or administrator takes in the estate of the deceased - - - -	972
IX. Of the disposition of the estate of the deceased - - - -	975
X. Of the liability of an executor or administrator in respect of the acts of the deceased - - - -	984
XI. Of the liability of an executor or administrator in respect of his own acts - - - -	987
XII. Actions by executors and administrators - - - -	993
XIII. Actions against executors or administrators - - - -	1002
XIV. Admission of assets.—Devastavit - - - -	1008
XV. Cests - - - -	1009
XVI. Judgment - - - -	1011
XVII. Administration bond - - - -	1012

CHAPTER XIII.

THE STATUTE AGAINST FRAUDS.

I. Observations on the statute 29 Car. II, c. 3, - - - -	1015
--	------

CONTENTS.

v

SEC.	PAGE
II. Sections 1 and 2.—Leases - - - - -	1016
III. Section 3.—Assignment or surrender of title - - - - -	1019
IV. Section 4. - - - - -	1021
V. Promise by an executor to pay the debt of the testator - - - - -	1022
VI. Promise to answer for the debt, default, or miscarriage of another - - - - -	1023
VII. Statement of the consideration - - - - -	1031
VIII. Agreements in consideration of marriage - - - - -	1038
IX. Contracts for the sale of lands - - - - -	1039
X. Agreements not to be performed within a year - - - - -	1044
XI. Memorandum or note in writing - - - - -	1046
XII. Agent - - - - -	1050
XIII. The 29 Car. II, c. 3, s. 17, and 9 G. IV, c. 14, s. 7, - - - - -	1050
XIV. What contracts for the sale of goods are within these enactments - - - - -	1051
XV. Delivery and acceptance - - - - -	1054
XVI. Earnest - - - - -	1059
XVII. Note or memorandum in writing - - - - -	1059
XVIII. Agent - - - - -	1062
XIX. Pleadings - - - - -	1065

CHAPTER XIV.

FRAUDULENT MISREPRESENTATION.

I. Fraudulent misrepresentation respecting the character or credit of another - - - - -	1067
II. Fraudulent misrepresentation respecting the subject matter of a contract - - - - -	1077

CHAPTER XV.

HUSBAND AND WIFE.

I. Of the operation of marriage on the wife's property - - - - -	1082
II. Wife's separate estate - - - - -	1086
III. Of the liability of the husband in respect of the contracts of his wife - - - - -	1089
IV. When a married woman is considered as a feme sole - - - - -	1100
V. Wife's privileges from arrest - - - - -	1105
VI. Actions by husband and wife - - - - -	1107
VII. Actions against husband and wife - - - - -	1118
VIII. Deeds of separation - - - - -	1121

CHAPTER XVI.

INSURANCE.

I. Of the contract of insurance, and the parties thereto - - - - -	1125
II. What may be insured - - - - -	1129
III. Of the interest of the insured.—Wager policies - - - - -	1133
IV. Re-insurance.—Double insurance - - - - -	1138
V. Of the form and requisites of a policy of insurance - - - - -	1139
VI. Valued and open policies - - - - -	1152

SEC.	PAGE
VII. Construction of policies - - - - -	1153
VIII. Of loss by the perils insured against - - - - -	1155
IX. Total loss and abandonment - - - - -	1165
X. Stranding - - - - -	1173
XI. General average - - - - -	1176
XII. Partial loss.—Particular average - - - - -	1178
XIII. Adjustment - - - - -	1180
XIV. Warranties - - - - -	1181
XV. Seaworthiness - - - - -	1189
XVI. Deviation - - - - -	1192
XVII. Illegal voyage - - - - -	1199
XVIII. Misrepresentation and concealment - - - - -	1203
XIX. Return of premium - - - - -	1209
XX. Bottomry and respondentia - - - - -	1214
XXI. Action on the policy - - - - -	1217
XXII. The declaration and pleadings - - - - -	1217
XXIII. Consolidation rule - - - - -	1221
XXIV. Evidence - - - - -	1223
XXV. Insurance upon lives - - - - -	1228
XXVI. Insurance against fire - - - - -	1233

CHAPTER XVII.

LIMITATIONS, STATUTES OF.

I. The 21 Jac. I, c. 16 - - - - -	1240
II. To what cases the statute extends - - - - -	1241
III. When the statute begins to run - - - - -	1242
IV. Avoiding the statute by issuing process - - - - -	1251
V. What acknowledgment will obviate the statute - - - - -	1253
VI. 9 G. IV, c. 14, Lord Tenterden's Act - - - - -	1256
VII. What promise will avoid the 9 Geo. IV, c. 14 - - - - -	1258
VIII. Part payment on account - - - - -	1265
IX. Payment by one of several joint debtors - - - - -	1266
X. What amounts to payment - - - - -	1270
XI. By and to whom the promise must be made - - - - -	1271
XII. The pleadings - - - - -	1272
XIII. Evidence - - - - -	1275
XIV. Limitation of actions in respect of realties - - - - -	1274
XV. Limitation of actions upon specialties - - - - -	1284

CHAPTER XVIII.

MALICIOUS PROSECUTION.

I. When an action will lie for a malicious prosecution - - - - -	1287
II. When an action on the case will lie for a malicious arrest - - - - -	1289
III. Malice and want of probable cause - - - - -	1290
IV. Determination of the original suit - - - - -	1294
V. The declaration and pleadings - - - - -	1295
VI. Evidence - - - - -	1298

CHAPTER XIX.

PRACTICE IN TRIALS AT NISI PRIUS.

SEC.	PAGE
I. Hearing counsel - - - - -	1302
II. Amending the record - - - - -	1309
III. Judge's certificate respecting costs - - - - -	1315
IV. Speedy execution - - - - -	1321

CHAPTER XX.

REPLEVIN.

I. When replevin will lie - - - - -	1323
II. By and against whom replevin may be maintained - - - - -	1324
III. Mode of proceeding in replevin - - - - -	1325
IV. The declaration - - - - -	1328
V. The pleadings - - - - -	1329
VI. Avowries and cognizances - - - - -	1331
VII. Subsequent pleadings - - - - -	1335
VIII. Evidence - - - - -	1337
IX. Judgment - - - - -	1339
X. Costs.—Practice - - - - -	1341
XI. Writs of recaption and second deliverance - - - - -	1343
XII. Proceedings on the replevin bond - - - - -	1344
XIII. Proceedings against the sheriff for taking insufficient pledges - - - - -	1347

CHAPTER XXI.

SLANDER.

I. Words actionable in themselves - - - - -	1350
II. Words spoken in respect of office, profession, &c. - - - - -	1355
III. Special damage - - - - -	1357
IV. Slander of title - - - - -	1359
V. Libel - - - - -	1360
VI. <i>Scandalum magnatum</i> - - - - -	1362
VII. Privileged communications - - - - -	1363
VIII. Privileged publications - - - - -	1371
IX. Disclosing the name of the author of the slander - - - - -	1376
X. The declaration - - - - -	1377
XI. The pleadings - - - - -	1389
XII. Evidence - - - - -	1393
XIII. Costs - - - - -	1400

CHAPTER XXII.

TRESPASS.

I. When trespass lies in general - - - - -	1401
II. Trespass to personal property - - - - -	1405
III. Trespass for assault and battery - - - - -	1409

SEC.	PAGE
IV. The declaration - - - - -	1412
V. The pleadings - - - - -	1413
VI. Replication - - - - -	1418
VII. New assignment - - - - -	1422
VIII. Damages - - - - -	1430
IX. Trespass for false imprisonment - - - - -	1432
X. Trespass to real property - - - - -	1438
XI. The declaration - - - - -	1446
XII. Pleadings - - - - -	1447
XIII. Crim. con. - - - - -	1455
XIV. Trespass for seduction - - - - -	1462

CHAPTER XXIII.

TROVER.

I. In what cases this action may be maintained - - -	1465
II. Absolute property and right of possession - - -	1467
III. Special property - - - - -	1474
IV. Possession alone, when sufficient - - - - -	1476
V. Conversion - - - - -	1477
VI. Demand and refusal - - - - -	1483
VII. Parties to this action - - - - -	1487
VIII. The declaration - - - - -	1490
IX. The pleadings - - - - -	1492
X. Lien - - - - -	1495
XI. Evidence and damages - - - - -	1500

CHAPTER XXIV.

WARRANTY OF HORSES. - - - - -	1503
-------------------------------	------

CHAPTER XXV.

WILLS.

I. Of the nature and general requisites of a will - - -	1511
II. Who may make a will; what property will pass thereby - - -	1513
III. Signing and attestation - - - - -	1515
IV. Witnesses - - - - -	1518
V. Revocation - - - - -	1523
VI. Proof of a will - - - - -	1529
VII. The 7 W. IV, & 1 Vic. c. 26 - - - - -	1532
APPENDIX - - - - -	1542
APPENDIX BY THE AMERICAN EDITOR - - - - -	1546
INDEX - - - - -	1561

AN
ABRIDGEMENT
OF THE
LAW OF NISI PRIUS.

CHAPTER VIII.
OF THE ACTION OF DEBT.

	PAGE
I. When it lies in general.	
II. The declaration	713
III. The pleadings	714
IV. Debt for rent	716
V. The declaration	730
VI. The pleadings	733
VII. Debt for double value	736
VIII. — for double rent	739
IX. — on bond	739
X. The declaration	760
XI. The pleadings	767
XII. Debt on bail bonds	770
XIII. The declaration	777
XIV. The pleadings	779

SECTION I.

WHEN DEBT LIES IN GENERAL.

THE action of debt is founded upon a privity of contract either express or implied, in which the certainty of the sum or duty appears; and the plaintiff is to recover the sum *in numero* and not in *damages*.^a Debt lies for money due on legal liabilities, and upon simple contracts express or implied, whether verbal or written, and upon contracts under seal or of record, whenever the demand is for a sum certain or capable of being reduced to a certainty.^b Where there is a *privity (independently of any security) between the parties, and the debtor undertakes not for another's debt but for his own, not to a stranger but to the creditor, and he enters into a contract to pay that debt, specifying therein that he enters into it for that debt, an

^a B. N. P. 167.
Vol. II.—1

^b *Id.* Com. Dig. *Debt*, A. B. 1.

action of debt lies.^a Debt, therefore, is sustainable on a bill of exchange, where there is a privity of contract between the parties. It will lie at the suit of the drawer against the acceptor, if there be some expression of consideration, "as value received," on the face of the instrument.^b At the suit of the payee against the drawer of a bill or maker of a note.^c By first indorser against the drawer of a bill payable to his order;^d but not by the payee or any other but the drawer against the acceptor;^e (1) nor will it lie on a promissory note payable by instalments, until the last day of payment be passed;^f for the different instalments are considered to constitute but one debt, and for one debt the plaintiff can bring but one action of debt.^g Debt is sustainable for any duty created by the common law or custom.^h It lies on contracts for the sale of goods or for the payment of money.ⁱ It lies on Irish^j and on foreign judgments,^k and upon the decree of a colonial court.^l

Records. Debt lies on *records* as upon the judgment of a superior or inferior court of record;^m (2) so upon a sheriff's return of a *fi. fu.*, for it is parcel of the recordⁿ; and on a statute merchant though not on a statute staple, because the seal of the party is not affixed to the latter.^o But debt does not lie on the decree of a court of equity founded on equitable considerations only.^p

^a Per Bayley, J., in *Priddy v. Henbrey*, 1 B. & C. 680. (8 Eng. C. L. 179.)

^b *Creswell v. Crisp*, 2 Dowl. 635. *Lyons v. Cohen*, 3 *id.* 243.

^c *Bishop v. Young*, 2 B. & P. 78. ^d *Stratton v. Hill*, 3 Price, 253.

^e *Bishop v. Young*, *supra*.

^f *Rudder v. Price*, 1 H. Bl. 547. 2 Saund. 303. But *assumpsit* will lie. *Id.*

^g 1 Saund. 201, *n.* *Bayley v. Hughes*, Cro. Car. 137.

^h Com. Dig. *Debt*, A. 9.

ⁱ *Emery v. Fell*, 2 T. R. 30. Com. Dig. *Debt*, A. But *assumpsit* will also lie. *Id.*

^j *Vaughan v. Plunkett*, 3 Taunton, 85. *Parkins v. Stewart*, 9 Price, 1. *Harris v. Saunders*, 4 B. & C. 411. (10 Eng. C. L. 373.)

^k *Henry v. Adey*, 3 East, 221. *Walker v. Witter*, Doug. 1.

^l *Henley v. Soper*, 8 B. & C. 16. (15 Eng. C. L. 147.)

^m Com. Dig. *Debt*, A. 2. *Murray v. Wilson*, 1 Wils. 316.

ⁿ 2 Saund. 343, 67, 70. ^o *Id.*

^p *Carpenter v. Thornton*, 3 B. & Ad. 52. (5 Eng. C. L. 224.)

(1) (*Contra*: it has been held in the Supreme Court of the United States that debt may be maintained by the indorsee of a Bill of Exchange against the acceptor. *Raburg et al. v. Peyton*, 2 Wheat. 385. *Kirkham v. Hamilton*, 6 Peters, 24.)

(2) (As to actions upon the judgments of the courts of one of the United States brought in another, see 1 Selwyn N. P. 494, *n. P.* *Goodrich v. Jenkins*, 6 Ohio, 44. A Justice's Court in Pennsylvania, is not a Court of Record within the provisions of the Constitution and Laws of the United States; but their judgments, when duly proved, are proceedings to which full faith and credit must be given, though to debt upon them *nil debet* is a good plea. *Silver Lake Bank v. Harding*, 5 Ohio, 546. In order to maintain a suit on a judgment of a Justice's Court in a sister state, the statute organizing such court must be shown; if, on the statute being proved, it appear that the subject matter of the suit was within the jurisdiction of the court, and that the proceedings were had in conformity to the statute, the judgment will be entitled to full faith and credit. *Thomas v. Robinson*, 3 Wend. 267.

An action may be sustained in one state on a judgment recovered in a *qui tam* action prosecuted in another of the United States. *Kealy v. Root*, 11 Pick. 389. *Spencer v. Brockway*, 1 Ohio, 124.

Debt on a judgment will lie where an execution has been levied irregularly, and without producing satisfaction. *Fish v. Sawyer*, 11 Conn. 545. See *Wood v. Pettie*, 4 Verm. 556.)

*Debt also lies on statutes. Where a statute gives part of a Statutes. penalty to a common informer, and enables him to sue by an express provision, debt lies.^a In some cases it is given to the party aggrieved by the express words of the statute, as for an *escape* out of execution;^b though not for an escape out of custody under an attachment for non-payment of costs under a decree in equity.⁽¹⁾ If the statute prohibits the doing of an act under a penalty or forfeiture to be paid to a party grieved, and does not prescribe any mode of recovery, it may be recovered in this form of action.^d

Debt lies against a returning officer at an election for 500*l.* penalty, under stat. 7 & 8 Wm. III. c. 25, 6, for not delivering a copy of the poll to a candidate, on being required so to do.^e So it lies to recover the costs and expenses of a returning officer, in defending himself before a committee of the House of Commons from charges of corruption and bribery, in a petition against the return of a member of parliament, if he has obtained the speaker's orders and certificate pursuant to stat. 28 Geo. III. c. 52.^f

Where a statute incorporating a gas company provided that the expenses of obtaining the act should be first paid out of the subscriptions, it was held that the attorneys who obtained the act might recover their costs in an action of debt founded upon the statute.^g But if a statute prescribes a particular remedy, no other than the remedy prescribed can be adopted. Therefore an action of debt will not lie for a poor's rate,^h and surveyors of highways cannot bring debt for composition money duly assessed in lieu of statute duty;ⁱ the statutes having prescribed a remedy by distress in both cases.

*Debt does not lie unless the demand be for a sum certain, *712
or for a pecuniary demand which can readily be reduced to a When
certainty.^j It does not lie for the arrears of an annuity or debt does
yearly rent devised payable out of lands, to *A.* during the life not lie.
of *B.*, (to whom the lands are devised for life,) *B.* paying the
same thereout so long as the estate of freehold continues.^k

^a Com. Dig. *Debt*, E. 1. *Fleming v. Bailey*, 5 East, 313. Bac. Ab. *Debt*, A.

^b 1 Ric. II, c. 12. 1 Saund. 34, 35, 39, 318.

^c *Blower v. Hollis*, 1 C. & M. 93. 3 Tyr. 356.

^d Roll. Ab. 598. *The College of Physicians v. Salmon*, 1 Lord Raym. 689.

^e *Smith v. Phillips*, (in Error,) 1 Bro. P. C. 69.

^f *Traeman v. Lambert*, 4 M. & S. 234.

^g *Tilson v. The Warwick Gas Company*, 4 B. & C. 962. (10 Eng. C. L. 462.)
7 D. & R. 376.

^h *Per Dennison, J.*, 2 Burr. 1157.

ⁱ 1 M'Clell. & Y. 450. 1 Chitty, Pl. 112.

^j B. N. P. 167. *Walker v. Witter*, Doug. 6. 1 Ch. Pl. 108.

^k *Webb v. Jiggs*, 4 M. & S. 113. See also *Kelly v. Clubbe*, 3 B. & B. 130. (7 Eng. C. L. 373.) 2 Saund. 304, n.

(1) (Debt for escapes. *Duncan v. Klinefelter*, 5 Watts, 144. *Brown v. Genung*, 1 Wend. 115. *Whitehead v. Varnum*, 14 Pick. 523. *Fullerton v. Harris*, 8 Greenl. 393. *Middlebury v. Naught*, 1 Verm. 423. *Weeks v. Lawrence*, *Ibid.* 433. A penalty given to the party grieved accrues at the commission of the offence, and consequently there may be damages for detention; but it is otherwise in the case of a common informer who has no interest before judgment. *Ritchie v. Shannon*, 2 Rawle, 196.)

Debt is not sustainable on a collateral contract as on a promise to pay the debt of another in consideration of forbearance.^a

A count that the defendant accepted a bill, and promised to pay the amount, whereby an action had accrued to the plaintiff to demand the amount, is in substance a count in debt, which does not lie for the indorsee against the acceptor of a bill of exchange.^b

Executors
and admin-
istrators.

Formerly debt could not be maintained against an executor on a simple contract made with the testator, except in those cases where the testator, if living, could not have waged his law.^c (1) But by the 3 & 4 W. IV, c. 42, s. 13, wager of law has been abolished, and sec. 14 enacts, that an action of debt on simple contract shall be maintainable in any court of common law, against any executor or administrator.

Less than
the sum
demanded
may be re-
covered.

It was formerly considered that in an action of debt, the plaintiff could not recover less than the sum declared upon, and if he could not prove himself entitled to recover that sum he should be nonsuited.^d But it is now settled that he may recover less than the sum demanded.^e For the difference is, that where debt is brought upon a covenant to pay a sum certain, a variance in the statement of the sum mentioned in the deed will vitiate, but where the deed relates to the matter of fact, there, though the plaintiff demand more than is due, he may enter a *remittitur*.^f It is immaterial that the aggregate of the sums claimed in several counts exceeds the amount claimed in the *queritur*.^g

*713

*SECTION II.

THE DECLARATION.

THE declaration in debt on simple contract must state the consideration, and also the inducement necessary to explain the contract or consideration as in *assumpsit*; but it must be alleged that the defendant *agreed*, not that he *promised*, to

^a Com. Dig. Debt, B. Bishop v. Young, 2 B. & P. 83.

^b Cloves v. Williams, 3 Bing. N. C. 864. (39 Eng. C. L.)

^c 1 Saund. 216, 286. 2 id. 74.

^d B. N. P. 171. Holme v. Saunders, 3 Lev. 4.

^e Walker v. Witter, Doug. 6. Ayllett v. Low, 2 Bl. 1221. Lord v. Houston, 11 East, 62.

^f Per Holt, C. J., 2 Lord Raym. 816.

^g Gardner v. Bowman, 4 Tyr. 412. See M'Quillin v. Cox, 1 H. Bl. 249.

(1) (Wager of law has been allowed in Pennsylvania in debt on simple contract. *Barnet v. Drie*, 17 S. & R. 212. Debt on simple contract lies against executors. *Tepper v. Tepper*, 3 Ohio, 387.)

pay the debt.^a A count that the defendant, in consideration that the plaintiff had sold and delivered divers goods, undertook to pay *quantum valebant* upon demand, with an averment that the said goods were worth 20*l.*, whereby an action hath accrued to the plaintiff, is not a good count in debt, and cannot be joined in a declaration with counts in debt.^b In declarations on specialties or records no consideration need be shown, for it is implied; unless where the performance of such consideration constitutes a condition precedent, then the performance must be averred; and where the action is founded on a deed, it must be declared upon, except in the instance of debt for rent;^c and the omission to set out the deed can be taken advantage of by special demurrer only.^d In debt on a bye-law for not paying 2*s.* per annum quarterly, the breach need not assign the days of quarterly payment.^e Where in articles of agreement under a penalty, there are mutual covenants between *A.* and *B.* to do certain acts, and also a covenant which goes to the whole consideration on each side; to an action of debt for the penalty brought by *A.* against *B.* on account of the non-performance of his part, *B.* may plead in bar a breach by *A.* of the covenant which goes to the whole consideration.^f

Where the debt sued for is one entire demand, and the plaintiff proceeds for a part only, he must aver that the rest has been satisfied. But in debt on a mortgage deed for payment of principal with interest, a declaration for the principal ^{*714} only, without averring that the interest had been satisfied, was held good, because the sums were separate and distinct.^g In an action of debt on simple contract, the declaration is good though it specify by the several counts a less sum than appears to be demanded by the recital of the writ, and yet assigns as a breach the non-payment of the sum demanded in the writ, and in such an action the plaintiff may prove and recover a less sum than is stated to be due.^h

The rules as to the declaration and pleadings in assumpsit and covenant are in general applicable to those in debt on simple contract; and on specialties respectively.

If one sue several defendants in debt, and the evidence do not fix all the defendants, the plaintiff must be nonsuited; and the judge will not allow the declaration to be amended by striking out the names of those defendants who are not affected by the evidence.ⁱ Where *A.* covenanted to pay *B.* 270*l.* on

^a Bishop v. Young, 2 B. & P. 78. Brill v. Neele, 3 B. & A. 208. (5 Eng. C. L. 264.) But see Ninam v. Bland, 3 Smith, 114. Gardner v. Bowman, 4 Tyr. 412.

^b Dalton v. Smith, 2 Smith, 618.

^c Atty v. Parish, 1 N. R. 109. 1 Saund. 376.

^d Tilson v. Warwick Gas Company, 4 B. & C. 962; (10 Eng. C. L. 432;) see *ante*, 710.

^e Innholder's case, 1 Wils. 281.

^f St. Alban's (Duke) v. Shore, 1 H. Black. 270, *ante*, 682.

^g Dickinson v. Harrison, 4 Price, 293.

^h McQuillen v. Cox, 1 H. Black. 249.

ⁱ Cooper v. Whitehouse, 6 C. & P. 545. (25 Eng. C. L. 535.) Alderson.

the 15th of December, with interest up to that time, and did not do so, and *B.* brought an action of debt, laying his damages at 10*l.*; held, that *B.* could not recover more than the principal, the interest up to the 15th of December, and 10*l.* more, although the interest up to the time of the action amounted to a larger sum; and the judge at the trial would not order the declaration to be amended by inserting a larger sum than 10*l.* as the damages.*

SECTION III.

THE PLEADINGS.

*715 FORMERLY the general issue in debt on simple contracts or on statutes, or where the deed was only matter of inducement, was *nil debet*; but now by Reg. Gen. H. T. 4 W. IV, the plea of *nil debet* is abolished; and it is ordered that in actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that he never was indebted in manner and form as in the declaration alleged, and such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*, and all matters in confession and avoidance shall be pleaded specially. In other actions of debt in which the plea of *nil debet* has hitherto been allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration or plead specially in confession and avoidance.^b The form of plea prescribed by the above rule must be strictly adhered to. A plea that the defendant never did owe, was held bad on special demurrer, the form being that he never was indebted.^c In debt for work and labor on an implied contract, the defendant may show under *nunquam indebitatus* that the work was done under circumstances which did not raise an implied contract to pay anything.^d But upon this plea the defendant cannot go into any evidence of misconduct, except such as shows that there was no implied contract.^e

A plea that parcel of the money claimed was the residue of a sum agreed to be paid for a boat warranted sound and fit for use, but which was afterwards found to be of no greater value

* *Watkins v. Morgan*, 6 C. & P. 661. (25 Eng. C. L. 584.) *Littledale*.

^b Reg. Gen. H. T. 4 W. IV.

^c *Smedley v. Joyce*, 2 C. M. & R. 721. 1 Gale, 357.

^d *Cooper v. Whitehouse*, 6 C. & P. 545. (25 Eng. C. L. 535.) *Cousins v. Pad-*
don, 2 C. M. & R. 553, *ante*, 128.

^e *Id.*

than the sum paid at the time of the sale, was held bad on demurrer as amounting to the general issue.^a A plea in debt, that the defendant does not owe the said 10*l.* above demanded (the sum demanded being 1800*l.*) is sufficient; as the amount may be rejected as surplusage.^b A plea to an *indebitatus* count in debt, that when the said sum of, &c., became due and payable, the defendant paid it, according to his contract and liability, should conclude with a verification.^c

Where in debt against the acceptor of a bill of exchange for 7*l.* the defendant pleaded payment into court of 5*l.*, and "that he was not indebted beyond that sum" upon which issue was joined; held, that under this plea the defendant might make any defence applicable to the plea of *nil debet* though the plea would have been ill on special demurrer.^d

Where a declaration in debt demanded 60*l.* and contained six counts for 10*l.* each, and the defendant pleaded that he did not owe the said sum of 10*l.* above demanded, and the plaintiff *716 "treated the plea as a nullity and signed judgment, the court set the judgment aside.^e Though under a plea of *non assumpsit*, evidence of payment is admissible in reduction of the damages,^f yet under a plea of *nunquam indebitatus*, the defendant cannot give evidence of payment, for in an action of debt there is no inquiry of damages.^g

Under a plea of *nunquam indebitatus*, to an action of debt for goods sold, the defendant may show that the goods were sold on a credit not yet expired.^h But he cannot under this plea, give evidence of payment in reduction of damages.ⁱ

In debt, or *scire facias*, on a judgment or recognisance, the general issue is *nul tiel record*, which may be properly pleaded where there is no record at all, or one different from that which the plaintiff has declared upon.^j The plea of *nul tiel record* to an action of debt on an Irish judgment must conclude to the country.^k

Debt on
scire facias
or judgment.

Nothing can be pleaded to a *scire facias* on a judgment which might have been pleaded to the original action. There fore in a proceeding by *scire facias* on a judgment, a plea of bankruptcy of the plaintiff must show distinctly that the bankruptcy happened at such a time that the defendant had no opportunity of pleading the fact to the original action. A

^a Dicken v. Neale, 1 Mees. & Wels. 556. 5 Dowl. 176.

^b Attwood v. Bonacich, 1 D. & R. 473. (16 Eng. C. L. 49.)

^c Goodchild v. Pledge, 2 Gale. 7. 1 Mees. & Wels. 363.

^d Finleyson v. Mackenzie, 3 Bing. N. C. 824. (32 Eng. C. L.) See Rawlins v. Danvers, 5 Esp. 38.

^e Risdale v. Kelly, 1 C. & J. 410. Edington v. Town, 1 M. & P. 276. But see Macdonnell v. Macdonnell, 3 B. & P. 174.

^f See ante, 145.

^g Belpin v. Butt, Exch. T. T. 1837, MS.

^h Broomfield v. Smith, 1 Mees. & Wels. 542. 2 Gale, 114. See ante, 127.

ⁱ Belbin v. Butt, 2 Mees. & Wels. 423. 1 Mur. & Hur. 70. Ante, 716.

^j Gilbert, (Debt,) 444. Marsh v. Cutler, 3 Mod. 41. Tidd's N. P. 363.

^k Id. Collins v. Lord Mathew, 5 East, 473. See Guinness v. Carrol, 1 B. & Ad.

459. (20 Eng. C. L. 499.)

plea which left it uncertain whether the bankruptcy happened subsequently to the judgment was held bad on special demurrer.^a

SECTION IV.

DEBT FOR RENT.

Debt lies for rent on a lease for lives or years.

***717** RENTS reserved on leases for years, or tenancies at will, were recoverable at common law by an action of debt; and so were the arrears of rent received on a lease for life *after the expiration* of the lease; but debt did not lie at common law for rent reserved on a lease for lives during the continuance of the lease,^b until the 8 Anne, c. 14, s. 4, which enacted, that "any *person entitled to rent in arrear, on a lease for life or lives might have an action of debt during the existence of the life, in the same manner as he might have done in case such rent were due or reserved upon a lease for years."^c

Executors and administrators may maintain debt for rent.

At common law, if a person seised of rent-service, rent-charge, rent-seck or fee-farm in fee-simple died, and there was rent arrear, neither his heir or executor could maintain an action of debt for such rent: the heir was not competent to sue, because he was a stranger to the personal contracts of his ancestor; and the executor was incompetent, inasmuch as he did not represent his testator as to any contracts relating to the freehold and inheritance. To obviate this inconvenience it was enacted by stat. 32 H. VIII, c. 37, s. 1, that an executor or administrator of any person seised of rent-service, rent-charge, or rent-seck, or of a fee-farm rent, in fee, in tail, or for life, might maintain debt against the person who ought to pay the same, and his personal representative.^d

Debt will lie for rent whether the demise be by deed, by

^a Baylis v. Hayward, 1 Harr. & Woll. 609. 5 Nev. & M. 613.

^b 1 Roll. Ab. 694, (G.) pl. 1. Ognel's case, 4 Rep. 49. 2 Saund. 303.

^c It has been held that this provision applies only to the case of rent due from a tenant holding by lease or demise under his landlord, and therefore that debt does not lie for the arrears of an annuity issuing out of lands, and payable to the annuitant for life, although it is not stated in the declaration that the grantor had a freehold in the premises out of which the annuity was payable; as it must be inferred that he had such an interest, where nothing appears to the contrary. Kelly v. Clubbe, 6 Moore, 335. 3 B. & B. 130. (7 Eng. C. L. 378.) Nor for the arrears of an annuity or yearly rent devised payable out of lands to A. during the life of B., to whom the lands are devised for life, paying the same thereout so long as the estate of freehold continues. Webb v. Jiggs, 4 M. & S. 113.

^d The executors of tenant for life of a rent-charge, and of tenant *pur autre vie*, after the death of *cestuique vie*, might bring debt to recover the arrears of such rent *by the common law*. But they could not distrain for the arrears by the common law, which they may now do by force of the statute. 1 Saund. 282. This is a remedial law, and shall extend to all tenants for life. *Id.*

writing not under seal, or by parol. Any words which are sufficient to create a privity of contract between the parties, will enable the landlord to maintain this action. It lies, therefore, for the non-payment of rent on the word "yielding" in a lease for years, for it is an agreement to pay rent which amounts to a contract.^a

Since the action of debt is maintainable in respect of the *privity of contract, it is immaterial whether there is any privity of estate or not; therefore the entry of the tenant on the land demised is not necessary to enable the landlord to maintain an action of debt.^b If the lessor assign the rent without reversion, the assignee may maintain debt for it, because the privity of contract is transferred.^c Debt lies against a devisee of land, for the breach of covenant by the devisor.^d If a lessee for years assigns all his interest to another the lessor may still have an action of debt against him, for the rent in arrear after the assignment, for the lessee shall not be permitted to prevent by his own act, such remedy as the lessor had against him on his contract.^e But if the landlord has accepted rent from the assignee of the lessee, he cannot maintain debt against the lessee or his representatives; his remedy is by an action of covenant on the express contract.^f It is not clearly settled whether debt lies against the assignee of part of the land demised for the rent of the whole.^g But debt lies against such assignee for the portion which he holds, or against him and the lessee jointly for the whole rent.^{h(1)}

*718

Debt lies for use and occupation on a parol demise where the premises are held under a lease, not by deed, even though the lessee himself has not occupied the premises; for he is liable in respect of his express contract.ⁱ If rent be payable quarterly or otherwise *debt* lies on each default.^j Use and occupation.

At common law, if the lease was determined before the legal time of payment, there could be no apportionment in respect of part of the time; as if a tenant for life made a lease, rendering rent at Christmas and died at Michaelmas, there could be Apportionment of rent.

^a 1 Saund. 233.

^b *Bellasis v. Burbrick*, 1 Salk. 209. *Eaton v. Jaques*, Doug. 455. 1 Saund. 202, *a*.

^c *Allen v. Bryan*, 5 B. & C. 512. (11 Eng. C. L. 292.) *Robins v. Cox*, 1 Lev. 23.

^d *Marle v. Flake*, 3 Salk. 118.

^e *Wilson v. Knubley*, 7 East, 137., but covenant lies also. 11 G. IV. 1 W. IV, c. 47, *ante*, 666.

^f *Auriol v. Mills*, 4 T. R. 98.

^g 1 Saund. 241. 2 *L.* 181, 297.

^h *Curtis v. Spitty*, 1 Bing. N. C. 758. (27 Eng. C. L. 563.) 1 *Hodges*, 153.

ⁱ 2 Saund. 182.

^j *Wilkins v. Wingate*, 6 T. R. 62. *Egler v. Maresden*, 5 Taunt. 25. (1 Eng. C. L. 6.) *The Dean of Rochester v. Pierce*, 1 Camp. 466. *Bull v. Sibbs*, 8 T. R. 327. *Conolly v. Baxter*, 2 Stark. 527. (3 Eng. C. L. 453.) But if the plaintiff has recognised another person as his tenant, he cannot afterwards charge the lessee. *Thomas v. Cooke*, 2 B. & A. 119.

¹ 2 Saund. 302.

(1) (*Norton v. Vutter*, 1 Hall, 384. The assignee of the lessor may maintain debt against the assignee of the lessee. *Howland v. Coffin*, 9 Pick. 52. 12 Pick. 126.)

*719 no apportionment of the rent for three quarters. But now by *stat. 11 Geo. II, c. 19, s. 15, "where tenant for life dies before, or on the day on which rent is reserved or made payable, upon any demise or lease of lands, &c., which determines on the death of such tenant for life, his personal representative may in an action on the case recover from the under-tenant of such lands, &c., if the tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time the tenant for life lived, of the last year or quarter of a year, or other time in which the said rent was growing due, making all just allowances or a proportional part."

- A lease for years by a rector having ceased by his death, the succeeding incumbent received from the lessee the rent for the whole year in the course of which the lessor died; held, that the executor was entitled to an apportionment.^a Where a tenant for life with leasing power granted leases from year to year, some by parol and some in writing, but not conformable to the power, and died before the expiration of the year, it was held that the lessee's interest was determined by the death of the lessor, and that the rent was apportionable.^b But where a tenant in fee demised lands from year to year and died, having devised the lands for life, and the devisee for life received rent, but did not live long enough to have a right to determine the yearly tenancy; held, that the administrator of the tenant for life was not entitled to an apportionment of the rent. For the tenant for life could not have put an end to the occupation of the sub-tenants, as notices to quit had not been given; and it was better to adhere to the words of the statute than to force constructions.^c

By 4 & 5 W. IV, c. 22, the provisions of 11 G. II, c. 19,^d respecting the apportionment of rents, are extended to rents reserved on leases, determining upon the death of the person making the same, (although not strictly tenant for life,) or on the death of the tenant *pur autre vie*. And by sec. 2, "all rents, annuities, and other payments coming due at fixed periods, under any instrument executed, or (being a will) which shall come into operation after the passing of this act, shall be apportioned, so that on the death of any person interested therein, or on the determination, by any other means, of the interest of such person, he or his personal representatives shall be entitled to a proportion thereof, subject to all just deductions; and the person entitled to such proportion shall have the same remedy for the recovery thereof as he would have had for the recovery of the entire portion, but so that persons liable to pay

^a *Hawkins v. Kelly*, 8 Ves. 308.

^b *Ex parte Smith*, 1 Swans. 337. *Symons v. Symons*, 6 Madd. 207. A land-tax, quit-rent, &c., is not apportioned as between tenant for life and remainder-man. *Sutton v. Chaplin*, 10 Ves. 66.

^c *Botheroyd v. Woolley*, 1 Gale, 66. 1 C. M. & R. 834.

^d *Ante*, 719.

rents by any lease or demise on the lands, shall not be resorted to for such apportioned parts; but the entire shall be received by the person who, if this act had not passed, would have been entitled to such entire rents; and the proportion shall be recoverable from him by the party entitled to it in any action or suit at law or in equity." By s. 3, "these provisions shall not apply to any case in which there is an express stipulation that no apportionment shall take place; or to annul sums made payable in policies of insurance."

SECTION V.

*720

THE DECLARATION.

IN debt for rent upon a lease founded on privity of estate, Venue. as when brought by the assignee or devisee of the lessor or his personal representatives against the assignee of the lessee, the action is local, and the venue must be laid in the county where the estate lies.^a But in debt by the lessor against the lessee or his executor, the action is transitory and the venue may be laid in any county; and so may the venue in debt for use and occupation.^b The plaintiff need not state any of the particulars of the demise, or show the local situation of the premises in the declaration.^c In debt for rent reserved by deed, it is usual, though not necessary, to state the deed in the declaration, unless in the case of a lease of tithes or other incorporeal hereditaments which could not be granted without deed.^d(1) In debt for rent on a lease by the lessor, the plaintiff need not set out his title, as the lessee is estopped from disputing it; but where the action is brought by a party claiming by a derivative title from the lessor, as by the assignee of the reversion, or by the heir of the lessor, or by an executor of a term, or for rent which became due after the death of the testator; the declaration should state the title of the lessor to the demised premises, in order that it may appear that he had such an es-

The deed need not be stated.

Derivative title.

^a *Thrale v. Cornwall*, 1 Wils. 165. *Patterson v. Scott*, Stra. 776. *Bord v. Cadmore*, Cro. Car. 183. 1 Saund. 241.

^b *Egler v. Marsden*, 5 Taunt. 25. (1 Eng. C. L. 6.)

^c *Davies v. Edwards*, 3 M. & S. 380. *Wilkins v. Wingate*, 6 T. R. 69. *King v. Fraser*, 6 East, 348. But if the particulars of the demise be stated, they must be proved as stated. *Bristow v. Wright*, Doug. 665. 1 Saund. 203, 5th ed.

^d 1 Saund. 276, d. 2 Saund. 297. 2 Ch. Pl. 279. See *Atty v. Parish*, 1 N. R. 109.

(1) (It is settled that in debt for rent, the plaintiff may state the substance of the demise without declaring on the deed, and, where it is doubtful, whether the lease were by indenture or parol, it is usual to do so, adding a count for use and occupation by way of further caution. *Devis v. Shoemaker*, 1 Rawle, 135.)

tate in the reversion as might legally be vested in the plaintiff in the character in which he sued, and legally entitle him to recover the damages claimed in respect of the breaches of covenant.^a

So, in debt by a remainder-man for rent reserved upon a lease by the tenant for life, the plaintiff must shew what authority *the tenant for life had to make the lease.^b In debt for rent reserved on a lease for years, it is not necessary to aver an entry or occupation by the lessee; for though he neither enters nor occupies he must pay the rent, it being due by the contract and not by the occupation; but in debt on a lease at will for rent in arrear, the plaintiff must show an occupation, for the rent being only due in respect thereof, it should appear to the court when the lessee entered and how long he occupied.^c Whenever rent is reserved periodically, the declaration should state at what time it became due;^d and if the action be for part of a gale due at the end of any particular period, the declaration should state how the remaining part was satisfied, for otherwise the lessee may be exposed to many actions for the same demand.^e

Variance. If the declaration profess to set out the terms of the reservation of rent, it will be a variance to omit the words "except as hereinafter mentioned," referring to a subsequent proviso by which a deduction is to be made if a certain event happen, although that event may not have happened.^f Where a declaration in debt for rent stated a demise of a messuage, land, and premises, with the appurtenances; the proof was of a demise of a messuage and land, together with the furniture, utensils, and implements: held, that as the rent issued out of the real property and not out of the furniture, it was sufficient for the plaintiff to allege and prove a demise of the real property, and therefore there was no variance.^g Where in debt for rent on a lease, by lessor against the assignee of the lessee, the declaration stated that all the estate, &c., of the lessee came to and vested in the defendant. It was in evidence that defendant was assignee of part only of the demised premises: held, a fatal variance.^h

Against executor or administrator, In debt for rent against an executor or administrator, if the *whole rent has accrued in the lifetime of the lessee, the action must be in the *detinet* only; and even though the personal representative do not enter, he is still chargeable in the *detinet*,

^a 1 Ch. Pl. 363. Com. Dig. Pleader, c. 36. Gilbert, Debt, 410.

^b Sands v. Ledger, 2 Lord Raym. 792.

^c 1 Saund. 202, a. Bellasis v. Burbrick, 1 Salk. 209. Eaton v. Jacques, Doug. 457. Williams v. Bosanquet, 1 B. & B. 238. (5 Eng. C. L. 72.)

^d Gilbert on Debt, 414. Show. 8. 2 Ch. Pl. 280.

^e Saund. 201, a.

^f Vavasour v. Ormrod, 6 B. & C. 430. (13 Eng. C. L. 225.)

^g Farewell v. Dickenson, 6 B. & C. 251. (13 Eng. C. L. 162.)

^h Curtis v. Spitty, 1 Bing. N. C. 758. (27 Eng. C. L. 563.) 1 Hodges, 153, ante, 718.

for he is bound to perform all the contracts of the lessee as far as he has assets; but for rent accrued after the death of the lessee the action may be brought either in the *debet* or *detinet* if the personal representative enters; for he is chargeable as assignee in respect of the perception of the profits, whether he has assets or not, and if judgment be given against him it is *de bonis propriis*.^a And if part of the rent be incurred in the lifetime of the lessee and part after his death, the action may be brought in the *detinet* only for the whole, but it cannot be brought in the *detinet* for part and in the *debet* and *detinet* for the other part in the same action, for there two different judgments would be necessary.^b If the declaration be in the *debet* and *detinet*, in a case which ought to be laid in the *detinet* only, it is demurrable; but not so when it is in the *detinet* only, in a case which might be in the *debet* and *detinet*.^c If the personal representative enter, he cannot plead *plene administravit*, but if the land be of less value than the rent, he may plead the special matter and pray judgment whether he shall be charged otherwise than in the *detinet* only.^d

Detinet for rent against an executor of lessee is transitory, because it is for arrears in the testator's time: but when it is in the *debet* and *detinet* for rent accrued in the executor's time, it must be where the land lies; for in this case the executor is charged as assignee on the privity of estate, and not on the privity of contract.^e

SECTION VI.

*723

THE PLEADINGS.

If the tenancy be created by deed, and the deed is the foundation of the action, the general issue is *non est factum*; but if the tenancy be not created by deed, or if the deed is an inducement only, *non demisit* is the general issue.⁽¹⁾ All other

^a 1 Saund. 1. Lord Rich v. Frank, Cro. Jac. 238. 1 Rol. Ab. 603. By 3 & 4 W. IV, c. 42, s. 64, an action of debt on simple contract is in all cases maintainable against executors and administrators.

^b Salter v. Gobbold, 3 Lev. 74. 1 Saund. 1. Aylmer v. Hide, S. N. P. 610.

^c Id. Wilson v. Hobday, 4 M. & S. 120.

^d B. N. P. 165. 1 Saund. 1. Billingham v. Spearman, 1 Salk. 297.

^e Gilbert, Debt, B. 2, C. 2. Cornel v. Lisset, 2 Lev. 80.

^f See ante, 695, as to what matter this plea puts in issue.

^g 2 Saund. 297. B. N. P. 170. 3 Ch. Pl. 877.

(1) (In debt for rent claimed under a lease by indenture *nil debet* is a good plea; because the indenture is not considered the gist of the action. It does not acknowledge a debt like an obligation; the debt accrues by the subsequent enjoyment of the demised premises under it, and it will be received as evidence to show the relation of landlord and tenant between the

Riens in arrears. matters of defence must be specially pleaded. Formerly *riens in arrears* might be pleaded in debt, but since the new rules it would be demurrable.^a If the demise be by indenture, and it is so stated in the declaration, the defendant cannot plead *nil habuit in tenementis* in an action by the lessor; for he is estopped by the deed from alleging that the plaintiff had no power to demise.^b But if the indenture be not alleged in the declaration *nil habuit in tenementis* is *prima facie* a good plea, because no estoppel appears upon the record; the plaintiff, however, may reply that the demise was by indenture and rely upon the estoppel; but if he replies that he had a sufficient estate in the premises, he loses the benefit of the estoppel.^c (1) *Nil habuit in tenementis* cannot be pleaded in an action for use and occupation, nor in any case by the lessee where he has occupied the premises.^d

Entry and eviction. Entry and eviction of the whole or part of the premises demised may be pleaded in bar to an action of debt for the rent; for the rent is thereby suspended; but the plea to be sustainable must state an *eviction* or *expulsion* of the lessee by the lessor, and a keeping him out of possession until after the rent became due.^e A mere trespass or an illegal ouster by the lessor will not operate as a suspension of the rent.^f A plea in bar, that the lessor *pulled down a summer-house*, whereby the lessee *was deprived of the use thereof*, without saying that he was *expelled* or put out of the same, was held insufficient; being a mere *trespass*, but no *eviction*.^g

*724

A plea of eviction by a stranger must show that the stranger had a good title to evict.^h If a lessor grants more land than he is entitled to, it operates as an eviction as to that part to which he has no title.ⁱ

^a 3 Ch. Pl. 877.

^b *Wilkins v. Wingate*, 6 T. R. 62. And see *Parker v. Manning*, 7 T. R. 537, *ante*, 696. *Gilbert*, Debt, B. 3, C. 3. But it is a good plea in an action on a demise by a deed-poll, because as to the lessee it is no estoppel. See *Lewis v. Wallis*, 1 Wils. 314.

^c 1 Saund. 276, *b*.

^d *Curtis v. Spitty*, 1 Bing. N. C. 15. (27 Eng. C. L. 291.) 4 Moor & S. 554.

^e *Bushell v. Lechmore*, 1 Lord Raym. 370. *Hodgskin v. Queenborough*, Willes, 129. 1 Saund. 204. The principle upon which eviction is a defence is this, that the rent issues out of the land and is to be paid out of the profits, and if the land be taken away the rent is discharged. *Slade v. Thompson*, 1 Roll. 198. Co. Litt. 292, *b*.

^f *Id.* *Vouchell v. Dancastel*, Moor, 891. B. N. P. 177. Where our books speak of an apportionment, in cases where the lessor enters on the lessee in part, they are to be understood where the lessor enters lawfully, as upon a surrender, forfeiture, or such like, where the rent is lawfully extinct in part. Co. Litt. 148, *b*. It is settled law at this day that the tenant is discharged from the payment of the whole rent till he can be restored to the whole possession. Bac. Ab. "Rent," M. 1.

^g *Hunt v. Cope*, Cowp. 242.

^h *Jordan v. Twells*, Cas. temp. Hardw. 171. 1 Saund. 204.

ⁱ *Tomlinson v. Day*, 5 Moore, 558. 2 B. & B. 680, (6 Eng. C. L. 315,) *infra*. But see *Neale v. Mackenzie*, post, 726.

plaintiff and defendant, and the amount of the rent, and when payable. *Kennedy, J.*, in *Bauer v. Roth*, 4 Rawle, 83.)

(1) (*Davis v. Shoemaker*, 1 Rawle, 135.)

Where premises are let at an entire rent, an eviction from part, if the tenant thereupon give up possession of the residue, is a complete defence to an action for use and occupation.^a But if the tenant, after the eviction, continue in possession of the residue, he is liable upon a *quantum meruit*.^b Where *A.* took a farm under an agreement from *B.* that *A.* should have the exclusive right of sporting over the manor in which it was situate, and should also occupy certain glebe land within the parish; *A.* entered into possession, but did not sign the agreement, and it appeared that *B.* had no power of conferring the right of sporting, nor could he procure the glebe land: in an action for the use and occupation of the farm, held that evidence was admissible to show the annual value of the land without such right, which might be ascertained by the jury, independently of the amount of the rent reserved by the agreement.^c Where lands had been let to one, who underlets to "others, and the latter received a notice to quit from the original landlord, in consequence of which one of them did so, and the lands occupied by him remained unlet for a year, and were then let by the original tenant; it was held that the original landlord could not recover in use and occupation for the rents of the unoccupied premises, as the circumstances amounted to an eviction, and might be pleaded to the whole demand.^d

*725

Where by parol a dwelling-house and premises were demised for a year, and the lessee accepted the lease, and by virtue of the demise entered upon the premises, but before and at the time of the demise, eight acres included in it had been demised to a third party, in whose possession they were, so that the lessee could not and did not enter upon them, the Court of Exchequer held, that the lessee was in under the lease, he taking an *interesse termini* in the eight acres; and that the want of possession was not equivalent to an eviction by the tortious act of the landlord, but was *quasi* an eviction by an elder title, and that, therefore, while out of the possession of the eight acres, the rent was not suspended but was apportioned; and might be distrained for.^e But on a writ of error this decision was reversed in the court of Exchequer Chamber. Lord Denman, C. J., in delivering the judgment of the court, observed, that as the defendant had taken no interest as to the eight acres, and as he was not bound by any estoppel, (this not being the case of a demise by indenture,) the distress was not justified. If a lessor demises by parol more land than he is entitled to, at an entire rent, and the lessee enters upon that portion of the land only which the lessor has a right to let, he is not liable to a distress; for the rent

^a Smith v. Raleigh, 3 Camp. 513. Ellenborough.

^b Stokes v. Cooper, 3 Camp. 514, n. Dallas.

^c Tomlinson v. Day, 5 Moore, 558. 2 B. & B. 680, (6 Eng. C. L. 315,) *supra*. In reference to this case Lord Denman said, in Neale v. Mackenzie, 1 M. & W. 764, *post*, 726, that if it was an eviction of an exclusive right of sporting, it was by title paramount. The agreement for exclusive sporting was not void because of an agreement to let it to another person, but it was defeated because another person interposed who had a right superior to the landlord.

^d Burn v. Phelps, 1 Stark. 94. (2 Eng. C. L. 310.) Ellenborough.

^e Neal v. Mackenzie, 1 Gale, 119. 2 C. M. & R. 84.

cannot be apportioned.

able as to the whole or any portion of the rent; no demise of the eight acres had ever taken place, and, consequently no right to any rent in respect thereof had ever come into existence. There was no case where an entire rent reserved had been held to be apportionable, in which the tenant had not been at some period subject to the entire rent by virtue of the demise. The right of apportionment in this case was not founded on any eviction or other matter occurring subsequent to the demise, but on an original defect in the demise itself, by which the entire rent was *reserved. The impediment to the defendant to take possession was not analagous to an eviction; for no interest in the eight acres passed to him, the demise being wholly void.^a

*726

Plea of the statute of limitations.

All actions of debt for the arrears of rent not reserved by deed must be brought within six years,^b and actions for rent due on specialty must be brought within twenty years after the cause of action accrued.^c The statute of limitations must in all cases be specially pleaded, and the plea must conclude with a verification.^d(1)

SECTION VII.

DEBT FOR DOUBLE VALUE.

A tenant holding over after the expiration of his term, to be liable to double value.

By 4 Geo. II, c. 28, s. 1, "if any tenant for life or years or other person who shall come into possession of any lands, tenements, or hereditaments by, under, from or in collusion with such tenant, shall wilfully hold over any lands, &c., after the determination of such term and after demand made and notice in writing given for delivering possession thereof, by the landlord or lessor or person entitled to the reversion or remainder of such lands, &c., or his or their agent, such person so holding over shall, for the time he shall so hold over, pay to the persons kept out of possession, their executors, administrators or assigns, at the rate of double the *yearly value* of the lands, &c., for so long time as the same are detained, to be recovered in any court of record by action of debt, whereunto the defendant shall be obliged to give special bail, and against the recovery of which penalty there shall be no relief in equity."

This is a remedial law, as the penalty is to be given to the

^a Neale v. Mackenzie, 1 Mees. & Wels. 747. See Bac. Ab. "Leases," (N.) Dove v. Wilcott, Cro. Eliz. 160. Com. Dig. "Estates," (G. 13.)

^b 21 Jac. I, c. 16. See "Limitations, statute of," *post*.

^c 3 & 4 W. IV, c. 42, s. 3, *post*.

^d 1 Saund. 283.

(1) (The statute of limitations may be given in evidence under *nil debet*. *Davis v. Shoemaker*, 1 Rawle, 155.)

party aggrieved, therefore, it is to be construed liberally; accordingly it has been held, that though the words are "after demand made, and notice in writing given," the notice in writing is of itself a sufficient demand; and that a receiver appointed "under an order of the Court of Chancery is "an agent lawfully authorised" within the meaning of the statute.* Lord Ellenborough, however, considered that, as it was a penal statute, it ought to be construed *strictly*, and he therefore held, that it did not extend to a weekly tenant, and, consequently, that an action of debt for double value would not lie against him for holding over after notice to quit;^b and a tenant who holds over *under a fair claim* of right will not be considered as *wilfully* holding over within the meaning of the statute, and, therefore, will not be liable to pay double value though it eventually turns out that he had no right.^c But though the landlord has recovered the premises in ejectment, he may afterwards maintain an action for double value during the time that the tenant held over after the expiration of notice to quit; for it is cumulative and has no reference to any antecedent remedy which the landlord had to recover possession. The two actions were brought *diverso intuitu*, the one to recover possession wrongfully withheld, the other to indemnify the landlord for the wrong.^d

*727

The statute does not extend to weekly tenants, or to tenants holding over under a fair claim of right.

Acceptance of a single rent is a waiver of the double value.^e But where a landlord declared in debt, first, for the double value; secondly, for use and occupation; the tenant pleaded *nil debet* to the first, and a tender of the single rent before the action brought to the second count, and paid the money into court, which the plaintiff took out before trial, and still proceeded; it was contended that the plaintiff ought to be nonsuited upon the ground that such acceptance of the single rent was a waiver of his right to proceed for the double value. But the court held otherwise, observing that the plaintiff's going on with the action after taking the single rent out of court, was evidence to show that he did not mean to waive his claim for the double value, but to make it *pro tanto*; and they seemed to think that though the single rent were paid into court on the second count, yet, if the plaintiff had not accepted it, but had recovered on the first count, the defendant would have been entitled to have the money so paid in, deducted out of the larger sum recovered.^f

*728

If a landlord give notice to quit or pay a certain rent, and the tenant holds over, the former may maintain use and occu-

* *Wilkinson v. Colley*, 5 Burr. 2694.

^b *Lloyd v. Rosbee*, 2 Camp. 453. See *Sullivan v. Bishop*, 2 C. & P. 329. (12 Eng. C. L. 170.) It seems to be doubtful whether quarterly holdings come within this statute. *Wilkinson v. Hall*, 3 Bing. N. C. 1. (32 Eng. C. L.) 3 Hodges, 56.

^c *Wright v. Smith*, 5 Esp. 203.

^d *Soulsby v. Neving*, 9 East, 310.

^e *Doe d. Cheney v. Batten*, Cowp. 243. 9 East, 314, n.

^f *Ryal v. Rich*, 10 East, 48.

pation, and shall recover the rent specified in the notice.^a Notice to quit, under this act, may be previous to the expiration of the lease.^b

If notice be given to a woman and she afterwards marries, it is not necessary to give notice to her husband. In debt for double the yearly value, the plaintiff, after stating a demise to the defendant's wife, and her subsequent intermarriage with the defendant, alleged in the first count a notice to quit, and demand of possession delivered to the defendant and his wife; and in the second count alleged a notice to quit, and demand of possession delivered to the wife previous to her intermarriage with the defendant; held, that to support the second count, the husband need not be joined for conformity, and that to sustain the action it was not necessary to have given a notice to the husband subsequent to the intermarriage.^c

Though a demise be for a certain time, a demand of possession and notice in writing, &c., are necessary to entitle the landlord to double rent or value; but such demand may be made above six weeks afterwards, if the landlord have done no act in the mean time to acknowledge the continuation of the tenancy; and if the tenant hold over, the landlord will be entitled to double value from the time of such demand; but if the rent be reserved quarterly, and the demand be made in the middle of a quarter, the landlord cannot recover single rent for the antecedent fraction of such quarter.^d

Tenants in common cannot sue jointly, under this statute, for double value, where there has been no joint demise. They must sever if the tenant held the premises by a separate demise from each, for persons cannot join in an action unless they have a *joint interest.^e Where one entire injury is done to both tenants in common they shall have one entire remedy, but where the injury is separate they may have several actions.^f

The administratrix of an executor cannot sue for the double value of lands held over after notice to quit, under a demise from the testator, without taking out administration *de bonis non*, even though the tenant has attorned to her.^g

SECTION VIII.

DEBT FOR DOUBLE RENT.

A tenant holding By 11 Geo. II, c. 19, s. 18, "if any tenant shall give notice of his intention to quit the premises holden by him, at a time

^a *Anon.* Lofft. 153.

^b *Cutting v. Derby*, 2 Bl. 1075.

^c *Lake v. Smith*, 1 N. R. 174. See *Wilkinson v. Colley*, 5 Burr. 2694.

^d *Cobb v. Stokes*, 8 East, 358.

^e *Wilkinson v. Hall*, 1 Bing. N. C. 713. (27 Eng. C. L. 555.) 1 Hodges, 170.

^f *Per Curiam*, in *Cutting v. Derby*, 2 Bl. 1077.

^g *Tingrey v. Brown*, 1 B. & P. 310.

mentioned in such notice, and shall not deliver up the possession thereof accordingly at the time in such notice contained, then such tenant, his executors or administrators shall thenceforward pay to the landlord double the *rent* which he should otherwise have paid to be levied, sued for, and recovered at the same time and in the same manner as the single rent could; and such double rent shall continue to be paid during all the time such tenant shall continue in possession." It is observable that this act is distinguishable from 4 Geo. II, c. 28, which subjects the tenant to double the yearly value when the landlord gives him notice to quit, whereas by this act he is subject to double the *yearly rent* when he himself gives notice. Whether the tenancy be by a lease or a parol demise it is within the above provision. The tenant's notice need not be in writing.^a

But this statute only applies to those cases where the tenant has the power of determining the tenancy by a notice, and "where he has actually given a valid notice sufficient to determine such tenancy, or the insufficient notice has been assented to by the landlord in writing."^b There must be some time fixed in the notice to bring it within the statute; a notice that the tenant will quit as soon as he can get another situation will not enable the landlord to recover double rent though the tenant had got another situation.^c In an action for double rent on the statute, for holding over after notice, the jury may find for so much as the tenant appears to have overheld, without reference to the sum demanded, so that it be not more than that sum.^d

over, after having given his landlord notice to quit, is liable to double rent.

*730

^a *Timmins v. Rowlinson*, 3 Burr. 1603. This act is penned differently from that of 4 Geo. II, c. 28, and seems to have been designed to lay a less restraint upon the notice to be given by the tenant than the 4 Geo. II, had laid upon the landlord, in obliging him to give notice in *writing*; and the reason is much stronger for obliging landlords to give notice in writing; for landlords generally *can* write, tenants in the country very seldom can. Per Wilmot, J., *id.* 1608.

^b *Johnston v. Hudleston*, 7 D. & R. 411. 4 B. & C. 922. (10 Eng. C. L. 471.) Declaration in replevin, avowry for double rent of premises of which plaintiff was tenant from year to year to defendant, and which he held over after the expiration of his own notice to quit. Plea in bar, that the notice was not in writing, and was given less than six months before the day therein mentioned for quitting possession. Replication, admitting the allegations in the plea, but averring that the demise was by parol, and that defendant recognised, assented to, and adopted the notice. On demurrer to the replication, held, first, that the tenancy was not determined, the notice to quit being insufficient, and there being no surrender in writing, or by operation of law within the statute of frauds. Second, that the landlord was not entitled to double rent under 11 Geo. II, c. 19. s. 18. And third, that under this avowry, he could not recover the single rent, it not being part and parcel of the double rent avowed for. *Id.*

^c *Farrance v. Elkington*, 2 Camp. 591. The landlord has a remedy under this statute by distress as well as by action. *Timmins v. Rowlinson*, *Johnston v. Hudleston*, *supra*. But he has no right to distrain for double rent upon a *weekly* tenant who holds over after notice to quit. *Sullivan v. Bishop*, 2 C. & P. 359. (12 Eng. C. L. 170.)

^d *Anon. Loft.* 275.

SECTION IX.

DEBT ON BOND.

	PAGE		PAGE
1. Of the nature and requisites of a bond.		6. Liability of the heir, devisees, and personal representatives.	751
2. Of the stamp.	733	7. Void and illegal bonds.	753
3. Construction of bonds.	736	8. What will discharge a bond.	758
4. Liability of the obligor.	740		
5. ——— of surety.	744		

Of the nature of a bond. *731

Condition

Form of a bond.

1.—*Of the nature and requisites of a bond.*] A BOND is a deed or instrument under seal whereby one person binds himself to *another to pay a sum of money or to perform or suffer some particular act or thing at an appointed time. The person who thus becomes bound is called the obligor and the party to whom the bond is given is called the obligee. If the bond be merely for the payment of a sum of money, it is called a single bill or bond, *simplex obligatio*; but there is generally a condition in the nature of a defeasance^a annexed to it, the performance of which discharges the obligation; as to pay rent or perform covenants contained in a deed or repay a principal sum of money borrowed of the obligee, with interest, which principal sum is generally one half of the penal sum specified in the bond. If the condition be performed the bond becomes void, otherwise it becomes forfeited and absolute in law.^b

No particular form is necessary to constitute a bond; any words which create an obligation, or which amount to an acknowledgement of a debt, will be sufficient, as "I, (G. S.) do promise to pay to N. U., in December next," &c., or any form of expression to that effect, written or printed on paper, vellum or parchment, under seal and duly executed, will create a bond or obligation. It is essential, however, that there be an obligor and an obligee, and that there be a sum in which the former is bound.^c If, however, there be any defect in the statement of the sum or of the parties, the courts will construe it so as to give effect to the intention of the parties, if it can be collected from other parts of the instrument. As, where a person admitted himself to be indebted to another in a certain sum to be paid at a future day, and bound himself to pay it without mentioning to whom; the court said that it should be intended that he was bound to the person to whom he acknowledged

^a A defeasance is an instrument which defeats the force or operation of some other deed or estate, and that which in the *same deed* is called a condition, in *another deed* is a defeasance. Com. Dig. "Defeasance," A. 2 Saund. 47, s.

^b 2 Bl. Com. 340. Co. Litt. 172, a. Hurlst. on Bonds, 1.

^c Com. Dig. "Oblig." (A.) Shep. Touch. 56, 368. Loggins v. Titherton, Yelv. 235.

the debt to be due.^a So, where the condition of a bond recited that *A.* was indebted to *B.* in various sums of money, which were all stated in pounds sterling, and the obligatory part merely stated that the obligor became bound in 7700, without stating any description of money; it was held, that from the condition the intention manifestly was that the obligor should become bound in 7700 pounds, and that the word *pounds* might therefore be supplied.^b *732

With regard to the parties to this instrument, no person who is under a legal disability to contract or to enter into a covenant can become an obligor.^c But a feme covert, an infant, idiot or lunatic may be an obligee.^d The requisites essential to the execution of a covenant (which have been already noticed,^e) are in general applicable to that of a bond. If a bond be executed in a foreign country, where no seal is required, it may be enforced in this country on proof of the formalities requisite in such country being complied with.^f A bond, like any other deed, takes effect from the delivery; it is therefore no objection to its validity that it be not dated, or that it bear a false or impossible date. A delivery, however, may be to a third party, to hold pursuant to an agreement entered into at the time of the execution, until certain conditions be performed on the part of the obligee, in which case it is called an *escrow*, that is, a scrawl or writing, which is not to take effect until the conditions be performed; if, however, the instrument be delivered to the obligee himself, it will take effect immediately, though the conditions may not have been performed.^g Delivery. When an escrow.

A bond executed with the usual formalities, may operate as a deed *in presenti*, although at the time of such execution it was expressly agreed that it should not take effect until a certain event had happened, and the intention of the parties at the time of execution is a question of fact for a jury on the whole evidence.^h

*2.—*Of the stamp.*] A bond must not only be duly executed, but it must be properly stamped; for otherwise it will not be admissible in evidence for any purpose beneficial to the party producing it, and consequently it cannot be enforced.ⁱ *733

^a Langdon v. Goole, 3 Lev. 21. Lambert v. Braithwaite, 2 Stra. 945. Lloyd v. Lord Say & Sele, 10 Mod. 46. Cholmondley v. Chislow, 2 Jac. & W. 1.

^b Coles v. Hulme, 8 B. & C. 568. (15 Eng. C. L. 299.) See Waugh v. Russell, 1 Marsh, 214. (1 Eng. C. L. 241.) *Ex parte* Symonds, 1 Cox, 200. Targus v. Paget, 2 Ves. 194. Hulbert v. Long, Cro. Jac. 607.

^c See *ante*, 339. We have seen that an infant may bind himself in a single bill, for necessities, *ante*, 340. 1 Inst. 172.

^d Vin. Ab. Baron & Feme. Bac. Ab. Oblig. (D.) 2.

^e *Ante*, 702.

^f Adam v. Kerr, 1 B. & P. 360.

^g 2 Bl. Com. 307. Vin. Ab. Fait. (O.) Co. Litt. 36, c. Shep. Touch. 59.

^h Murray v. Stair, (Earl,) 3 D. & R. 278. 2 B. & C. 82. (9 Eng. C. L. 33.)

ⁱ 23 Geo. III, c. 49, s. 14, continued by the 55 Geo. III, c. 184, s. 8. Whitwell v. Dimsdale, Peake, 167. 2 Stark. Ev. 771.

The stamp duties are at present regulated by the 55 Geo. III, c. 184, which contains the following scale for bonds:—

Bond in England, and personal bond in Scotland, given as a security for the payment of any definite and certain sum of money.

	£	£	s.	d.
Not exceeding	50	1	0	0
Exceeding £50 and not exceeding	100	1	10	0
100	200	2	0	0
200	300	3	0	0
300	500	4	0	0
500	1,000	5	0	0
1,000	2,000	6	0	0
2,000	3,000	7	0	0
3,000	4,000	8	0	0
4,000	5,000	9	0	0
5,000	10,000	12	0	0
10,000	15,000	15	0	0
15,000	20,000	20	0	0
Exceeding 20,000	25	0	0	0

Bond given as a security for the payment or repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due on an account current, together with any sum already advanced, or due, or without, as the case may be, where the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit £25 0 0

Bond not otherwise charged, nor exempted from all stamp duty 1 15 0

*734 Where any such bond, together with any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, shall contain 2160 words or upwards, there shall be charged *for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of 1 5 0

Parties may purposely stipulate for the loan of a less sum in order to avoid the higher duty.^a If a number of persons severally bind themselves in a penalty by one bond, conditioned for the performance by each and every of them of the same matter, such bond requires but one stamp.^b A bond conditioned to secure to the plaintiffs to the extent of 5,000*l.*, which was held to guarantee a running account which the plaintiffs had with a third person, and not to be discharged with the first payment of 5,000*l.* only requires a 9*l.* stamp, and not a 25*l.*, as a security of an unlimited extent.^c So where the

Stamp on
a bond to
guarantee
a running
account.

^a *Shepherd v. Hall*, 3 Camp. 180.

^b *Bowen v. Ashly*, 1 N. R. 274. *Goodson v. Forbes*, 1 Marsh. 531. (1 Eng. C. L. 348.)

^c *Williams v. Rawlinson*, 3 Bing. 71. (11 Eng. C. L. 34.) 1 R. & M. 233. (31 Eng. C. L. 436.)

bond was conditioned to secure a banker from the balance arising from paying bills, &c., and it was stipulated that the whole amount to be ultimately recoverable should not exceed 1,000*l.*; held, that the bond did not require a 25*l.* stamp; the true construction of the act being, that where the sum to be ultimately recoverable is clearly limited, the duty should be the same as on a bond for the payment of such limited sum.^a A bond conditioned for the payment, by quarterly payments, of an annual rent, is a bond for the payment of a definite and certain sum, though payable at future periods.^b In order to ascertain the amount of the stamp, the condition and not the penalty is to be looked to; therefore where the condition was to pay any sum of money advanced, not exceeding 1,000*l.*, together with all such lawful allowances as are usually charged by bankers, &c.; it was held that a 5*l.* stamp was not sufficient, for the party would be required to pay not only the sum of 1,000*l.*, but also a further sum for commission.^c

A bond, conditioned for payment of a sum of money to the obligee on a day named, according to a proviso contained in a conditional surrender of even date, whereby *A.* (not the obligor *in the bond) surrendered to the obligee certain copyhold lands for securing payment of the same sum, was held to require a 1*l.* stamp only, although it bore no stamp denoting the payment of the ad valorem duty on the surrender, and the latter was not produced.^d *735

A bond and a mortgage executed on the same day for securing the same sum of money, but bearing different dates, require an ad valorem stamp on each instrument.^e Where a bond was conditioned for the payment on a certain day, being a year from the date, of a certain sum with interest at the rate of five per cent.; held, that a stamp covering the amount of the principal was sufficient.^f Where by a bond *A.* as principal, and *B.* as surety, were jointly and severally bound to pay to the creditors of *C.* 14*s.* in the pound on the account of their debts, and by the same bond *A.* was bound to indemnify *B.* against all loss by reason of his becoming surety; held, a stamp of 1*l.* 15*s.* was sufficient, and that it did not require a second stamp on account of its obligation to indemnify *B.*, the whole being one transaction.^g So an agreement stamp is not necessary to an arbitration bond, containing, besides the usual covenants, an agreement as to the payment of costs.^h A bond to secure the

^a *Lloyd v. Heatheote*, 1 C. & M. 336. 3 Tyr. 309. *Simson v. Cooke*, 1 Bing. 452. (8 Eng. C. L. 377.)

^b *Attree v. Ancomb*, 2 M. & S. 88.

^c *Dickson v. Cass*, 1 B. & Ad. 343. (20 Eng. C. L. 397.) *Scott v. Allsopp*, 2 Price, 20.

^d *Quin v. King*, 1 Mees. & Wels. 42. 1 Gale, 407.

^e *Wood v. Norton*, 9 B. & C. 885. (17 Eng. C. L. 516.)

^f *Dickson v. Robinson*, 1 M. & R. 115. 5 C. & P. 96. (24 Eng. C. L. 230.) *Foreman v. Jeyes*, 5 C. & P. 419. (24 Eng. C. L. 390.)

^g *Annandale v. Pattison*, 9 B. & C. 919. (17 Eng. C. L. 521.)

^h *Wansborough v. Dyer*, 2 Chitty, 40. (18 Eng. C. L. 242.)

damages to be recovered upon a new trial, and the costs of the action, in the event of the result of a second action proving similar to that of the first action, is properly stamped with a 35s. stamp.^a A bond conditioned for not converting a house to a particular purpose, does not require an *ad valorem* stamp.^b

The 5 Geo. IV, c. 41, has repealed the stamp duty on bail bonds, replevin bonds, bonds by petitioning creditors of bankrupt, and the assignment of all such bonds.

It is not necessary that the bond should be stamped at the
 *736 *time of the execution; if it bear a proper stamp when it is produced at the trial it is sufficient.^c

In the construction of bonds, the court will give effect to the intention of the parties.

3.—*Construction of bonds.*] In the construction of bonds the courts are in general guided by the same rules as in the construction of covenants.^d(1) They will endeavor to give effect to the intention of the parties, as far as it can be collected from the instrument itself. A single bill or bond is always taken most strongly against the obligor, but the condition being for his benefit, is construed most strongly in his favor.^e When the intention of the parties is manifest, the court will supply an accidental omission, and transpose or reject insensible words.^f Where the condition of a bond was, that if the obligor did *not* pay a certain sum to the obligee, then the obligation to be void, such an error was not permitted to defeat the apparent intention.^g

The father of two illegitimate children executed a bond, conditioned for the payment of an annuity of 30*l.* for the support of them and their mother during their *joint* natural lives; or in case of the death of the children, during the natural life of the mother; one of the children died: the court said that the intention of the obligor evidently was to provide for the mother as well as the children; and therefore so long as the mother only, or either of the children were living, he was liable on the bond.^h Where the condition of a bond, after reciting that the

^a *Lopes v. De Tastet*, 8 Taunt. 712. (4 Eng. C. L. 258.)

^b *Hughes v. King*, 1 Stark. 119. (2 Eng. C. L. 322.) *Ellenborough*.

^c *R. v. The Bishop of Chester*, Stra. 624. *Rogers v. James*, 7 Taunt. 147. (2 Eng. C. L. 52.) *Burton v. Kirby*, 7 Taunt. 174. (2 Eng. C. L. 66.) Most instruments (except bills, notes, receipts and policies,) may, though unstamped, or stamped with an insufficient stamp, be properly stamped on payment of the proper duty, and 5*l.* penalty. 48 Geo. III, c. 14, s. 2. See 55 Geo. III, c. 184. The court will enlarge the time for showing cause, in order to give a party time to get a proper stamp imposed. *Doe v. Roe*, 5 B. & A. 768. (7 Eng. C. L. 253.) *Chitty, Statutes*, 939. And see *Doe d. Dyke v. Whittingham*, 4 Taunt. 20.

^d See *ante*, 613.

^e *Shep. Touch.* 375. 3 Leon. 70. *Hurlst.* 31.

^f *Coles v. Hulme*, 8 B. & C. 568, (15 Eng. C. L. 299,) *ante*, 731.

^g *Wells v. Wright*, 2 Mod. 285. *Vernon v. Alsop*, 1 Lev. 77. *Hurlst.* 32.

^h *James v. Tallent*, 1 D. & R. 548. 5 B. & A. 889. (7 Eng. C. L. 290.)

(1) (A bond conditioned for the faithful performance of official duties, binds the obligors to a responsibility for reasonable and competent skill and due and ordinary diligence. *American Bank v. Adams*, 12 Pick. 303. So, such a bond is not discharged by a faithful accounting for moneys to the amount of the penalty, but stands good as a security for losses and defalcations to that amount. *Potter v. Tiltcomb*, 7 Greenl. 302.)

obligor was about to marry *A.*, a widow, and thereby became *possessed of her stock in trade, and that it was agreed that he should execute a bond to pay the children of *A.* by her former husband 300*l.* within twelve months after her death, in the event thereafter specified, was that "if the obligor should within twelve months after the decease of *A.* pay to his children 300*l.*, if upon an account taken the stock in trade and effects in the business (*if then carried on by the obligor*) should amount to 400*l.*; but in case upon such account to be taken, the stock in trade should amount to less than 400*l.*, then if the obligor should pay to the children of *A.* 120*l.* the bond should be void." The obligor having ceased to carry on the business before the death of *A.*, and there being no stock in trade when she died; the court held, that he was not liable on his bond, for according to the true construction of the condition, the obligor was not at all events bound to carry on the business. According to the true construction of the bond, he was to have an option to carry on the business or not.* Where a bond was given to commissioners of sewers by a collector of rates, conditioned for rendering a faithful account and paying to the commissioners all moneys already received, or which should thereafter be received; the condition was construed to extend to moneys received by the collector, by virtue of a rate made by the commissioners acting under the commission which expired before the execution of the bond; for the language of the bond extended to all moneys received by the collector, and such construction was conformable to the character of the commissions, and the duties which the collector was intended to perform.^b But where a bond was conditioned that a collector of church and poor's rates should produce a faithful account to the obligees or their successors, for moneys which might be received by him, or come to his hands, pursuant to and in execution of his said office of collector; held, that the obligor was not answerable for moneys received by him on account of any year subsequently to that in which the obligees were in office.*

The condition of a bond is frequently preceded by a recital *of explanatory facts, which in general will operate to control the condition. There is a difference between where the thing is recited in the condition in *general* words, and where in *particular* words. "If the condition contains a generality to be done, the party shall not be estopped to say there was not any such thing. But in all cases where the condition of a bond has reference to any *particular* thing, the obligor shall be estopped to say that there is no such thing."^d The recital of a

*737

*738

Recital in the condition sometimes operates as an estoppel.

* *Beswick v. Swindells*, 5 B. & Ad. 914. (27 Eng. C. L. 236.) 3 Nev. & M. 159.

^b *Saunders v. Taylor*, 9 B. & C. 35. (17 Eng. C. L. 325.)

^c *Leadley v. Evans*, 2 Bing. 39. 9 Moore, 102. (9 Eng. C. L. 306.)

^d 1 Rolle's Ab. 872, (*Estoppel*, P.) cited in 1 Ad. & Ell. 801. (28 Eng. C. L. 219.) 1 Saund. 215. Com. Dig. (*Estoppel*, E. 2.)

receipt of certain moneys due to the obligee will preclude the obligor from pleading that he never received such moneys.^a

A defendant having executed a bond describing himself as "T. B. of C., in the county of N. Esq.:" held, on judgment of outlawry and error assigned thereon, that by his own description of himself in the bond, he was estopped from saying that he was not properly described in the writ, "of a town, hamlet or place," within the words of the statute of additions, 1 Hen. V, c. 5.^b The obligor of a bond conditioned for the payment of rent, at the rate of 170*l.* a year, "according to an indenture of lease," is estopped, in an action on the bond, from saying that the rent reserved by the indenture was 140*l.* a year, though such was in fact the case.^c An obligor sued on a bond reciting a certain consideration, is estopped from pleading that the consideration was different, unless he can make it appear by his plea, that the real transaction was fraudulent or unlawful.^d If a bond in its recital refers to a bill of exchange as the principal security, the bond may be construed to be only a collateral security, although it is a specialty, and of a higher nature than the bill, which is only a simple contract debt.^e

*739 But a bond taken in the penal sum of 1,000*l.* cannot be reduced to 500*l.*, by a recital in the condition that the parties had agreed to execute a bond in the sum of 500*l.*^f

Effect of
recital in
bonds for
the due
performance
of duties in
office.

The extent of the condition of an indemnity bond may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate.^g The condition of a bond, reciting that the defendant had agreed with the plaintiffs to collect their revenues from "time to time for twelve months;" and afterwards stipulating that "at all times thereafter during the continuance of such his employment, and for so long as he should continue to be employed," he would justly account and obey orders, &c., confines the obligation to the period of twelve months mentioned in the recital.^h So where the condition, after reciting that the plaintiff had appointed T. to an office, *for the term of six months* was, that if the said T. did and would, *during all the time* that he should continue in the office, duly and faithfully observe the condition of the bond; it was held, that the condition referred to the recital, by which the defendant was bound only for six months.ⁱ So where the

^a Shelly v. Wright, Willes, 9. Fletcher v. Farrer, Roll. Ab. (Estoppel, P.) Hosier v. Searle, 2 B. & P. 399.

^b Bonner v. Wilkinson, 1 D. & R. 328. 5 B. & A. 682. (7 Eng. C. L. 231.)

^c Lainson v. Tremere, 3 Nev. & M. 603. 1 Ad. & Ell. 792. (18 Eng. C. L. 214.)

^d Hill v. The Manchester and Salford Water Works Company, 2 B. & Ad. 544. (29 Eng. C. L. 135.)

^e Ireland (Bank of) v. Beresford, 6 Dow. 234.

^f Ingleby v. Swift, 10 Bing. 84. (25 Eng. C. L. 36.)

^g Pearsal v. Summerson, 4 Taunt. 593.

^h Liverpool Water Works Company v. Atkinson, and Same v. Harpley, 6 East, 507. 2 Smith, 654.

ⁱ Arlington v. Merricke, 2 Saund. 412; which is considered a leading case on this subject.

bond recited that the defendant was the receiver of a certain company at Bristol, and was conditioned for truly accounting for all sums received by him; a breach stating that he had received money and did not account for it, was held bad, as it appeared by the recital, that he was only bound to receive money at a particular place in the exercise of his appointment there.^a But the recital will not qualify the condition, if it appears from the whole instrument the parties did not so intend it.^b Wherever there is a recital in the condition of a bond, that a person is appointed to an office, though the bond be conditional for the due collection by that person in such office of taxes, rates, or the like, at all times thereafter; yet, if the office is an annual one, a due collection for one year is a compliance with the condition.^c

*The preceding cases establish that when the recital definitely makes out the time for which a surety shall be liable, it is not to be extended by any subsequent general words; but where the recital in the condition of an indemnity bond professed to state the agreement between the parties, and a *new subject matter* was afterwards introduced, it was held, that the responsibility of the surety was not confined to the limits specified in the recital;^d and, though the recital may operate in restraint of the condition, it cannot affect the obligatory part of the bond; as where the condition of a bond, executed by the principal and two sureties in the penal sum of 1,000*l.*, contained a recital that the obligor had taken a farm of the plaintiff (the obligee,) subject to the payment of rent reserved in a lease of even date with the bond, and that it had also been agreed by the obligor and the plaintiff that the obligor should enter into a bond with two sureties in the penalty of 500*l.* for the due payment of the rent. Rent having been found by a jury to be due to the plaintiff to the amount of 740*l.*, the court refused to reduce the verdict to 500*l.*, to which only it was contended the sureties could be liable by virtue of the recital in the condition.^e

*740

Recital cannot affect the obligatory part.

4.—*Liability of the obligor.*] When the bond is forfeited by a breach of the condition, the penalty is the debt in law, and the true measure of the obligor's liability; for, though it was once considered^f that damages might be recovered for more than the amount of the penalty, it is now clearly settled that both at law and in equity, the obligee cannot recover more damages against the obligor for a breach of the condition of the bond, than the amount of the penalty and costs, though he

The obligor is only liable for the amount of the penalty and costs.

^a Horton v. Day, cited 2 Saund. 414.

^b Parker v. Wise, 6 M. & S. 339.

^c Peppin v. Cooper, 2 B. & A. 431. Hassell v. Long, 2 M. & S. 363. Warden of St. Saviour's Southwark v. Bostick, 2 N. R. 175. 2 Saund. 415, a. 5th ed.

^d Sansom v. Bell, 2 Camp. 39. 2 Saund. 415, a.

^e Ingleby v. Mousley, 3 M. & Scott, 488. (25 Eng. C. L. 36.)

^f Lord Lonsdale v. Church, 2 T. R. 388. Hurlstone on Bonds, 107. 1 Saund. 58, a.

*741
When interest may be recovered.

may have sustained damages far exceeding that amount.^a But in an action on a judgment recovered on a bond, interest may *be recovered in damages beyond the penalty of the bond.^b So if the penalty is contained in any other instrument than the bond, damages may be recovered beyond it, for the plaintiff has his option to sue for the penalty or for the breach of condition.^c If a bond be conditioned to pay several sums of money at different days, debt will lie immediately on default of payment at either of the days, for the condition is thereby broken.^d In general the obligee may be holden to bail, except on replevin and bail bonds; but though the penalty is the debt in law, yet where a bond is conditioned for the payment of money, the obligor should be arrested only for the sum really due by the condition, or if the bond be for the performance of covenants or to indemnify, he should be arrested only for the amount of damages sustained.^e In debt on a bond, conditioned for payment of the same sum as the penalty, *with interest*; held, that the jury might give interest by way of damages for the detention of the debt.^f A bond whereby the obligor bound himself "in the sum of 20*l.* to be paid yearly," is not like a bond with a penalty which can be forfeited, and so become a debt in law.^g

Obligor will be discharged on payment of principal and interest.

At common law the obligee might have had execution for the whole amount of the penalty, though far exceeding the sum really due, and the obligor could only obtain relief by resorting to a court of equity. To remedy this inconvenience the 4 Anne, c. 16, s. 13, enacted, "that if at any time pending an action on a bond with a penalty, the defendant shall bring into the court where the action shall be depending the principal and interest, together with the costs incurred; the money so brought in shall be taken in full satisfaction and discharge of the bond; and the court shall and may give judgment to discharge every such defendant from the same accordingly."

Stay of proceedings.

*742

In an action on a bond conditioned for the performance of *mortgage covenants, the court ordered proceedings to be stayed on payment of the principal and interest, and costs, to be computed and taxed by the master.^h But proceedings will not be stayed if the whole sum for which the bond is security be not due; as if it be conditioned for the payment of an an-

^a *Wilde v. Clarkson*, 6 T. R. 303. *Hiller v. Ardley*, 3 C. & P. 12. (14 Eng. C. L. 186.) *Brangwin v. Perrot*, 2 Bl. 1190. *Clarke v. Seton*, 6 Ves. 414. *Mackworth v. Thomas*, 5 Ves. 329. *Hughes v. Wynne*, 1 Mylne & K. 20. But see *Grant v. Grant*, 3 Russ. 598. *Judwine v. Agate*, 3 Sim. 129, where, under certain circumstances, a court of equity decreed to the plaintiff more than the penalty.

^b *M'Clure v. Dunkin*, 1 East, 436. 1 Saund. 58, a.

^c *Kl. Harrison v. Wright*, 13 East, 343.

^d *Coates v. Hewitt*, 1 Wils. 80. B. N. P. 168.

^e *Hatfield v. Lingard*, 6 T. R. 217.

^f *Francis v. Wilson*, R. & M. 105. (21 Eng. C. L. 391.) *Littledale*.

^g *Morant v. Gough*, 7 B. & C. 206. (14 Eng. C. L. 28.) 1 M. & R. 41.

^h *Skinner v. Stacey*, 1 Wils. 80.

nulty, or of money by instalments.^a As where a bond was conditioned for the payment of a principal sum in the year 1820, with interest in the mean time half yearly; an action having been brought for the penalty upon a breach of the condition in non-payment of half a year's interest on the 29th of September, 1817, the court refused to stay the proceedings before judgment on payment of the interest due and costs.^b

Where a bond was conditioned to pay 165*l.* by certain instalments until the whole should be paid, but if default was made in paying any one, the obligation was to remain in force; an action having been brought upon the bond, in consequence of a default in payment of the second instalment, a judge ordered that, on payment of the 15*l.* and costs, proceedings should be stayed; held, that the judge had no power to make such order.^c

But under such circumstances execution will be restrained to the arrears then due, and the judgment shall stand as a security for future arrears.^d

A bond, conditioned for the payment of a certain sum with interest, may be put in suit without a previous demand of payment; for the obligation to pay arises from the execution of the bond.^e But it is otherwise in case of a bond with a penalty to secure the performance of a collateral act.^f Therefore, where the condition of a bond is to pay a less sum on demand, it is necessary to prove a demand before action brought.^g

If a party bind himself generally to indemnify another from the consequences of a particular act, or against the act of a

Indemnity
bonds.

third person, the obligee, on being damnified, is immediately entitled to be reimbursed, and he may sue on the bond without giving notice to the obligor of its being forfeited.^h Where the indemnity is given as a security for money advanced, it frequently becomes questionable whether the guarantee is continuing. Where a bond conditioned to indemnify and save harmless the obligees, for "such sums as they in their banking business should within ten years advance or pay or be obliged to advance or pay for or on account of their accepting, discounting, &c., any bill of exchange, notes, &c., which *A. B.* should from time to time draw upon or make payable, &c., at their house; and also other sums which they, within the period aforesaid, should otherwise lay out, pay, &c., on the credit of the said *A. B.* or on his account; and also all such wages and allowances for advancing, paying, &c., such bills, &c., advances

*743

^a *Gowlett v. Hariforth*, 2 Bl. 958. *Tighe v. Crafter*, 2 Taunt. 387.

^b *Van Sandau v. —*, 1 B. & A. 214. ^c *Naylor v. Mopsey*, 4 Dowl. 669.

^d *Ogilvie v. Foley*, 2 Bl. 1111. *Judd v. Evans*, 6 T. R. 399.

^e *Gibbs v. Southam*, 3 Nev. & M. 155. 5 B. & Adol. 911. (27 Eng. C. L. 235.)

^f *Per Littledale, J.*, *id.* 913. Co. Litt. 208, *b.*

^g *Carter v. Ring*, 3 Camp. 459. *Ellenborough*.

^h *Cutler v. Southern*, 1 Saund. 115. *Challoner v. Walker*, 1 Burr. 547.

payments, &c., engagements and accommodations not exceeding the sum of 5,000*l.* in the whole, together with interest on such advances," &c.; it was held to guarantee running accounts and not satisfied by the first payment of 5,000*l.*^a

A bond conditioned to save *A.* harmless from all actions, legal proceedings, and costs, &c., which might be the consequence of *A.*'s delivering over to the defendant a bill of exchange, part of the proceeds whereof a third person was entitled to, is forfeited by a payment over by *A.* to such third person of his share of the proceeds, upon his demanding the same, without his bringing any action; although *A.* gave no notice of the payment to the defendant.^b

A bond to indemnify a parish against a pauper, is forfeited, though the parish, to avoid the expense of removal, choose to pay a weekly sum for his maintenance in another parish.^c

An undertaking to indemnify against any act or engagement will extend to any expense incurred by the obligee by virtue of such act or engagement. As where the bond was conditioned to indemnify a husband against his wife's debts; it was held,
 *744 *that the obligor was liable for the expenses incurred by the obligee in an action for necessaries supplied to the wife.^d

Extent of liability of a surety. 5.—*Liability of a surety.*] The liability of a surety will not be extended beyond the scope of his engagement as understood at the time he entered into it.^e(1) It has therefore been established by several decisions, that where a surety is bound for the faithful services of another party, or payments of a third party, to one or more persons, the responsibility of the surety does not extend to any subsequent change, unless an intention to that effect appears in the instrument.

When there is a change in the situation of the obligee.

As where the condition of a bond was that *S.*, who was engaged as a clerk to the plaintiff, should faithfully account for all moneys received by him while he continued in the service of the plaintiff, and the plaintiff afterwards took in a partner; held, that the defendant who was surety only was not answerable for the fidelity of *S.* after the partnership; for the condition was confined to the plaintiff only.^f So, it has been held that a bond with a condition that a clerk should faithfully serve and account for all money, &c., to the obligee and his *executors*, did not make the obligor liable for money received

^a *Williams v. Rawlinson*, 3 Bing. 71. (11 Eng. C. L. 34.) R. & M. 233. (21 Eng. C. L. 426.) See *Kirby v. Marlborough*, (Duke of,) 2 M. & S. 18.

^b *Ker v. Mitchell*, 2 Chitty, 487. (18 Eng. C. L. 399.)

^c *Allan v. Foxhall*, (Bart.) 2 Black, 1177.

^d *Duffield v. Scott*, 3 T. R. 374. *Sparkes v. Martindale*, 8 East, 593.

^e *Per De Grey, C. J.*, in *Wright v. Russell*, 2 Bl. 935. 3 Wils. 639.

^f *Wright v. Russell*, *supra*, 2 Saund. 414.

^g *Barker v. Parker*, 1 T. R. 287.

(1) (The liability of the surety in general cannot be carried beyond the penalty. *Maryland v. Weymen*, 2 Gill & John. 379.)

by the clerk in the service of the *executors* of the obligee, who continued the business and retained the clerk in the same employment.^a So where *A.* became bound to *B.* under condition that *C.* should truly account to *B.* for all sums of money received by *C.* for *B.*'s use, and *C.* afterwards, with *B.*'s knowledge, took *D.* as his partner; it was held, the guarantee should not extend to sums of money received by *C.* for *B.*'s use, after the formation of the partnership.^b So where a bond was given to *A., B., C., &c.*, payable to them and their successors, as the governors of the society of musicians, conditioned to secure *J. H.*'s faithfully accounting with them and their successors, governors, &c., as their collector; afterwards the society was incorporated by letters patent, at which time *J. H.* had duly *accounted for all moneys collected by him, but after the incorporation he received money for which he did not account; held, that the obligor of the bond was not liable for such default of *J. H.* in an action on the bond; for the original society was thereby destroyed, and in judgment of law a new body was constituted.^c On the same principle, a bond conditioned to repay to five persons all sums advanced by them, or any of them, in their capacity of bankers, will not extend to sums advanced, after the decease of one of the five, by the four survivors, the four then acting as bankers.^d So where a bond by *A.*, reciting that *B.* intended to open a banking account with *C., D., and E.* as his bankers, was conditioned for payment to them of all sums from time to time advanced to *B.* at the banking-house of *C., D., and E.*; held, that on *C.*'s death such obligation ceased, and did not cover future advances made after another partner was taken in; and that *B.*, who was indebted to the house at *C.*'s death, having afterwards paid off the balance which was applied at the time to the old debt incurred in *C.*'s lifetime, *A.* was wholly discharged from his obligation.^e

*745

The doctrine laid down in the preceding cases has been held to be equally applicable to a change of the *principals*; as where *C.* became a surety for such sums as should be advanced to meet bills drawn by *A.* and *B.* as partners, or either of them; it was held, that the obligation did not extend to bills drawn by *B.* after the death of *A.*^f And upon the same principle, where the defendant, as keeper of a county gaol, covenanted by indenture with the sheriff, (among other things,) "that he would personally attend the assizes and general quarter sessions of the county, and convey prisoners, when ordered to be removed by *habeas corpus*, safely and without escape, from the gaol, to such place as the writ should direct;" and the defendant and two sureties gave the sheriff a bond for the due

Liability of the surety where there is a change in the principals.

^a *Barker v. Parker*, 1 T. R. 287.

^b *Bellairs v. Ebsworth*, 3 Camp. 53. *Ellenborough*.

^c *Dance v. Girdler*, 1 N. R. 34.

^d *Weston v. Barton*, 4 Taunt. 673.

^e *Strange v. Lee*, 3 East, 484.

^f *Simson v. Cooke*, 1 Bing. 452. (8 Eng. C. L. 377.) 8 Moore, 588.

performance of such covenants; and the former being in attendance at the quarter sessions, the sheriff, on receiving a writ of *habeas corpus* for the removal of a prisoner, directed a warrant *for that purpose to the defendant and J. S. "by him (the sheriff) for that time only thereto specially appointed;" and J. S., who was the defendant's turnkey, proceeded with the prisoner towards the place of destination, but allowed him to escape; held, that the sheriff having specially directed the warrant to J. S., and appointed him for that particular purpose, that neither the defendant nor his sureties were liable in an action brought by the sheriff on the bond for a breach of the covenants contained in the indenture by the defendant as gaoler.*

Where a bond was given to the several persons constituting the firm of a banking-house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor, one of the partners dies, and a new partner is taken into the firm; at that time a considerable balance is due from the obligor to the firm; advances are afterwards made by the bankers, and payments made to them on account by the obligor; the latter is credited by the new firm with the several payments, and charged with the original debt and subsequent advances as constituting items in one entire account, and the balance due at the time of the partner's death is considerably reduced, and that reduced balance, by order of the obligor, is transferred by the bankers to the account of another customer, who, with his assent, is charged with the then debt of the obligor. The person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond. Held, that as they had not originally treated it as a distinct account but had blended it in the general account with other transactions, that they were not at liberty so to treat it at a subsequent period, and that having received in different payments a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, that the bond was to be considered as paid.^b

Surety to a house or firm. A distinction, however, has been taken between cases where the surety is given to individuals, and where it is given to a house or firm; as if the surety be for the fidelity of a clerk in a

*747 banking-house; in the latter case the surety continues liable, notwithstanding a change in the partnership; for the partners in a banking-house are perpetually changing, and where a number of clerks are employed, it would be highly inconvenient to require fresh surety upon every such change. A bond given to a house or firm is an undertaking for the clerk's honesty while he continues in the firm.^c It has therefore been

* Ryland v. Lavender, 9 Moore, 71. (9 Eng. C. L. 318.)

^b Bodenham v. Purchas, 2 B. & A. 39.

^c Barclay v. Lucas, 1 T. R. 291, n.

held, that a bond given to trustees to secure the faithful services of a clerk to the Globe Insurance Company, who were no corporation, might be put in suit by the trustees for a breach of faithful service committed by the clerk at any time during his continuance in the service of the actual existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer; the intention of the parties to the instrument being apparent, to contract for such service to be performed to the company as a fluctuating body; and the intervention of the trustees removing all legal and technical difficulties to such a contract made with, or suit instituted by, the company themselves as a natural body.* So where the condition of a bond, after reciting that *A. B.* and *C.* had filed a bill in equity against *D.* and *E.* was, that the obligee would pay all such costs as the Court of Chancery should award to the defendants on the hearing of the cause; it was held, Abbott, C. J., *dissentiente*, "that the death of *E.*, before any costs were awarded, could not be pleaded in discharge of the bond."

Upon the same principle, the liability of a surety for a person appointed to an office will be limited to the duration of that office, co-extensive only with the duty required to be performed, unless there be strong words to show clearly an intention that his responsibility should extend further; as if the office be an annual office, the surety will be liable only for a year, though the principal continue in office after that period.

Thus where *A. B.* and *C.* entered into a bond as sureties for *D.* and *E.*, the condition of which bond recited that *D.* was on such a day appointed collector of the church rate of the parish *of St. Saviour's, Southwark, by virtue of which office he was empowered to collect and receive all such moneys as were rated and assessed on the inhabitants by virtue of the said rate, and for which he was accountable to the wardens of the grand account, and bound the sureties for *D.*'s duly accounting for all moneys collected or received by him on account of the above rate, as also on all and every other rate or rates thereafter to be made and collected by him the said *D.*; held, that the sureties were only answerable for *D.* in that single appointment, and not on his appointment in the ensuing year.*

A bond made by the defendant's testator as surety for *E.*, with a condition reciting that *E.* had been and still was collector of the land tax, and all other taxes and duties imposed by several acts of parliament on the inhabitants of the parish of *C.* by means whereof he received from the inhabitants divers sums of money, and conditioned for the due payment by *E.* from time to time, and at all times thereafter, to the receiver-general of taxes, &c., all and every sum which he (*E.*) should

Surety to a party appointed to an office.

Surety of tax collector.

*748

* Metcalf (Bart.) v. Bruin, 12 East, 400. 2 Camp. 422.

* Kipling v. Turner, 5 B. & A. 261. (7 Eng. C. L. 89.)

* St. Saviour's, Southwark, v. Bostock, 2 N. R. 175.

from time to time collect and receive from the inhabitants of the parish, for, or on account of any tax or taxes then imposed, or which should or might thereafter be imposed on them by any act of parliament, was held to be confined to the current year for which *E.* was at the date of the bond collector, although it did not appear on the condition that he was only appointed for a year, it being shown by the defendant's plea that the said office of collector was an annual office, and held as such by *E.* at the date of the bond, although by the replication it appeared that *E.* held the office not only for that year, but from thence to the time of exhibiting plaintiff's bill.^a

Where the office of collector under an act of parliament was an annual office, and a bond, after reciting the appointment of *H. W.* to be collector under the act, was conditioned for the due collection by *H. W.* of the rates and duties at all times thereafter; it was held, that the due collection of the rates for one year was a compliance with the condition of the bond. And although it appeared from the condition of the bond that *H. W.* and *G. P.* were both appointed collectors; it was held, that such bond, being for the due collection by *H. W.* only, might be put in suit against the surety without first selling the goods of *G. P.*^b

When the duration of the office is not limited.

If, however, the duration of the office be not limited by act of parliament or otherwise, or if there be nothing in the condition to limit it to any particular time, the surety will continue liable so long as the collector shall continue in office. As where in debt on bond made by *C.* and his sureties, with a condition reciting statute 27 Geo. II, c. 38, and that *C.* (four years before the date of the bond) was appointed by the churchwardens and parishioners of *D.* in pursuance of the statute, collector of the poor rates to be levied and raised in the parish, and conditioned that *C.* should account, as often as required, for all moneys so collected and received by him, by virtue of the act, &c. Breach, for not accounting for moneys collected and received since the making of the bond, &c.; plea, that *C.* accounted for all the moneys collected and received by him before the making of the bond; secondly, that the office of collector is an annual office, and that *C.* accounted for all the moneys collected and received by him within the current year of the office in which the bond was made; upon demurrer, held that both pleas were ill, for, by the words of the statute, the appointment is prospective, to collect future rates, and not retrospective only, and the condition is in the words of the statute without any restraining words; and it is not pleaded that the office was an annual office at the time of making the bond, and if it had been, yet it appears by the statute not to be an annual office, though concerning rates which are raised in the course of the year.^c

The subordinate officers appointed under the St. Pancras

^a *Hassell v. Long*, 2 M. & S. 363.

^c *Curling v. Chalklen*, 3 M. & S. 502.

^b *Peppin v. Cooper*, 2 B. & A. 431.

Vestry Act, 59 Geo. III, c. 39, s. 19, by the select vestry, are not annual officers, but hold their offices during the pleasure of the vestry. Therefore, the bonds given by them to the directors of the poor, (who are annual officers,) under s. 57, continue in force after the directors, to whom they were given, have gone out of office.*

*Where a bond given to secure the faithful performance of the office of a collector of parochial rates, (who was by act of parliament to be appointed by trustees for a year, and then to be capable of re-election,) was conditioned, that, "from time to time, and at all times thereafter, during such time as he should continue in his said office, whether by virtue of his said appointment, or of any reappointment thereto, or of any such retainer or employment by or under the authority of the said trustees, or their successors, to be elected in the manner directed by the said act, he should use his best endeavors to collect the moneys received by means of the rates, in the then or in any subsequent year," &c., &c. Held, that the obligation of the bond was not confined to the year for which he was originally appointed, but extended also to all subsequent years in which he was continuously re-appointed.^b *750

The *laches* of obligees in a bond in not calling upon the principal obligor, a collector of taxes, as soon as they might have done, or in not taking proper steps to enforce payment from him as directed by the acts relating to the taxes, is no answer in an action against the surety;^c nor is it any defence at law, to an action on a bond against a surety, that by a *parol* agreement time has been given to the principal.^d But if a bond creditor enters into a binding contract with the principal debtor to give him further time to pay, without concurrence of his surety, the surety is discharged, because the creditor has put it out of his own power to enforce immediate payment, where the surety would have a right to require him to do so.^e Giving time to the principal.

If one of several co-sureties be compelled to pay the whole sum recovered, he may maintain an action against his co-surety for contribution;^f even though he had given a subsequent surety to the obligees, under which he paid the sum conditioned *in the bond, without the knowledge or consent of such co-surety.^g Contribution among sureties. *751

If *A.*, *B.*, and *C.* become bound as sureties for *D.* in three se-

* *M'Gahey v. Alston*, 1 Mees. & Wels. 386. 2 Gale, 46.

^b *Augero v. Keen*, 1 Mees. & Wels. 390. 2 Gale, 8.

^c *Trent Navigation Company v. Harley*, 10 East, 34. *Nares v. Rowles*, 14 East, 510. *Wilks v. Healy*, 1 C. & Mees. 249. 3 Tyr. 91. *Eyre v. Everett*, 1 Russ. 361. *London Assurance Company v. Buckle*, 4 Moore, 153. (16 Eng. C. L. 368.)

^d *Davey v. Prendergrass*, 5 B. & A. 187. (7 Eng. C. L. 62.) *Rex v. Berrington*, 2 Ves. Jun. 540. *Wright v. Simpson*, 6 Ves. 734. *Boxmaker v. Moore*, 1 Daniel, 261.

^e *Ireland (Bank) v. Beresford*, 6 Dow. 238. *Orme v. Young*, Holt, 84. (3 Eng. C. L. 35.) *Gibbs*.

^f *Cowell v. Edwards*, 2 P. & P. 268.

^g *Dunn v. Slee*, 1 Moore, 2. (4 Eng. C. L. 385.)

parate bonds, and any one of them be compelled to pay the whole debt of the principal, the two others are compellable to contribute in proportion to the penalties of their respective bonds.^a

If the surety becomes bankrupt after the bond has been forfeited, the debt is proveable under the commission; and his certificate is a bar to an action on the bond.^b

Liability
of the heir
and de-
visee.

6.—*Liability of the heir, devisee, and personal representative.*] If the heir be expressly mentioned in the obligatory part of the bond, he is liable in respect of assets by descent; but his liability does not extend beyond the value of the land, nor is he liable at all, unless he be expressly mentioned in the bond.^c At common law the heir might get rid of his responsibility, by disposing of the lands descended to him before action brought; but now both the heir and the devisee are liable for specialty debts to the value of the lands devolved upon them, even though they may have sold the land before action brought.^d

But the devisee is only liable where the debt becomes due in the lifetime of the testator; therefore, it has been held, that an action of debt could not be maintained by a covenantee against the devisees of a covenantor, where the covenantor was only a surety, and the breach of covenant did not take place in his lifetime; for the words of the act are, "and for the means that such creditors may be enabled to recover their said debts, be it further enacted, that every such creditor shall and may have an action of debt upon his bonds and specialties against the heir of such obligor and such obligee jointly, by virtue of the act;"^e it was clear from these words, that to bring a case within the mischief contemplated by the statute, there must exist the relation of debtor and creditor in the lifetime of the *devisor; and there could be no debt or claim against the surety until after the covenant was broken, and as that event did not happen in his lifetime, his devisee was not liable.^f

*752
Executors
and admin-
istrators.

The executors and administrators of the obligor are liable to the extent of assets, whether they be mentioned in the bond or not; and so the interest of the obligee passes to his executors and administrators, whether they be specifically included in the terms of the bond or not.^g

7.—*Void and illegal bonds.*] Whatever affects the validity

^a *Deering v. Winchelsea*, (Earl of,) 2 B. & P. 270.

^b *The Skinners' Company v. Jones*, 3 Hodges, 18. 3 Bing. N. C. (32 Eng. C. L.)

^c *Bac. Ab. (Heir.)* Shep. Touch. 369. *Barber v. Fox*, 2 Saund. 136.

^d 3 W. & M. c. 14, & 11 Geo. IV & 1 W. IV, c. 47. See further as to this subject, *ante*, 666.

^e 3 W. & M. c. 14, s. 3.

^f *Farley v. Briant*, 1 H. & W. 299. 5 Nev. & M. 58.

^g *Vin. Ab. Obligation, (R.)* Shep. Touch. 369. *Hyde v. Skinner*, 2 P. Wms. 197. See *ante*, 667.

of a simple contract,^a or of a covenant,^b will in general vitiate a bond; to constitute a good and valid condition it is necessary that it be for the performance of an act that is lawful and capable of being performed; it must be sensible and certain, and in no way repugnant to the obligation.^c If the bond be conditioned to perform an act that is impossible, as to pay money at a day past, or to render a person in execution who has once been discharged, the condition will be void, and the bond single, provided the condition be not incorporated with the obligatory part of the bond; but if it be so incorporated, the bond will be altogether void.^d When the condition is repugnant to the obligation, as if it be that the obligee shall not have the benefit of it, or at any time sue for the money in the obligation, the condition will be void, and the obligation binding.^e

There is a distinction to be observed between the effect of a condition that is impossible, insensible, or repugnant, and one that is unlawful. In the former cases the condition alone is void, and the bond becomes single; but in the latter instance not only the condition but the obligation is void.^f

If a bond be conditioned for the performance of several things, and one of them be void at common law, yet the bond may be good for the others; as where it was conditioned to pay money, and to do an act which was perhaps simony; held, that admitting part of the condition to be simoniacal, yet the bond was good for the payment of the money.^g(1) But if the condition of a bond is entire and the whole unlawful, or if it consists of several distinct parts, and any one of them contravene the provisions of an act of parliament, the whole bond will be void.^h A bond given by way of indemnity to one who had given his note for 350*l.* to a prosecutor on an indictment for perjury, to induce him to withhold his evidence, is void *ab initio*, and the facts may be specially pleaded.ⁱ So is a bond given to an indorsee, to recover payment of a note originally given for an illegal stock-jobbing transaction, of which the indorsee had notice before he took the bond.^j So is a bond given to a creditor of a bankrupt in order to induce him to withdraw a petition which he had presented to the Chancellor,

*753

^a See *ante*, 8-21.

^b *Ante*, 634.

^c Com. Dig. (Condition,) D. Bac. Ab. Condition.

^d *Id.* Barrett v. Fletcher, Brownlow, 114. De Costa v. Davis, 1 B. & P. 242. Pullerton v. Agnew, 1 Salk. 173.

^e Shep. Touch. 373. Com. Dig. Condition, (D.)

^f Hurlstone, 13.

^g Newman v. Newman, 4 M. & S. 66. R. v. Yale, 2 Bro. P. C. 181.

^h 1 Saund. 66, *a.* Norton v. Syms, Moore, 856. Lee v. Calshall, Cro. Eliz. 529. Hob. 14. See *ante*, 41. But a bond taken by commissioners under the tax act is not void if taken with one surety only, though the statute directs that two should be taken. Beppin v. Cooper, 2 B. & A. 431, *ante*, 749.

ⁱ Collins v. Blantern, 2 Wils. 341-347.

^j Amory v. Meryweather, 4 D. & R. 86. 3 B. & C. 573. (9 Eng. C. L. 183.)

(1) (*United States v. Bradley*, 10 Peters, 360.)

against the allowance of the certificate.* A bond given in consideration of past cohabitation is good;† and it makes no difference that the obligor's wife was alive during such cohabitation, for the court will not distinguish between different degrees of immorality. As where a married man living with his wife cohabited with a single woman, who knew that he was married, and at the termination of the illicit intercourse gave her a bond to secure the payment of an annuity for the support of herself and two young children, the offspring of their cohabitation; held, that the bond was valid, and that an action at law might be maintained on the bond to recover the arrears of the annuity.‡ But a bond in consideration of future cohabitation

*754 *with a woman seduced by obligor, and for maintenance after his death, is void.§

To debt on bond, the defendant pleaded that the bond was given to secure payment of the price of goods agreed to be sold and delivered in London, by the plaintiff to the defendant to be by the latter shipped to Ostend, and from thence re-shipped for the East Indies, and there trafficked with clandestinely; held, a sufficient bar to the action; the case being within statute 7 Geo. I, c. 21, which avoids all contracts for supplying cargoes to foreign ships in such a trade.¶

In an action on a bond the defendant may show that it was given for an illegal consideration.

Where in an action of debt on a bond, the defendant pleaded that the bond was given to secure the payment of the premium to be paid pursuant to a corrupt agreement, that the plaintiff should take the defendant's son as an apprentice to learn the profession of a surgeon and apothecary; and that the said agreement was antedated, in order that by such corrupt contrivance, the apprentice might be admitted to practise as an apothecary after serving two years, instead of five years, as required by the 55 Geo. III, c. 194. After verdict for the defendant, it was moved that the verdict should be entered for the plaintiff, *non obstante veredicto*, on the ground that as the object of the agreement was to apprentice for a surgeon as well as for an apothecary, and as no apprenticeship for a particular period was required to practise as a surgeon, it could not be a corrupt agreement to take the apprentice for two years, to teach him surgery; but the court refused the application, on the ground that there was a distinct allegation in the plea that the intention was to defeat the provisions of the statute of apothecaries, and the truth of that allegation was established by the verdict. It was broadly laid down in *Collins v. Blantern*,^f that the defendant might show that the consideration was illegal.‡

* *Sumner v. Brady*, 1 H. Black. 647.

† *Turner v. Vaughan*, 2 Wils. 339.

‡ *Nye v. Mosely*, 9 D. & R. 165. 6 B. & C. 133. (13 Eng. C. L. 119.)

§ *Walker v. Perkins*, 3 Burr. 1568. 1 W. Black. 517. And see *Gibson v. Dickie*, 3 M. & S. 463. See *ante*, 35.

¶ *Lightfoot v. Tenant*, 1 B. & P. 551.

^f 2 Wils. 341, *ante*, 753.

‡ *Prole v. Wiggins*, 2 Hodges, 904. 3 Bing. N. C. 230. (39 Eng. C. L.)

An officer cannot commute for money the services of an impressed man, nor let him go for money; and a bond given to secure the man's return on non-payment of such money, is void, and may be avoided by plea disclosing the true transaction, and showing that the man was illegally impressed.^a

The illegality of the condition of the bond may be shown by the plaintiff, in stating the bond itself with the condition in the declaration; or if he omit to state the condition it may be shown by the defendant in his plea, and the court will equally take notice of the illegality in either case.^b Where a bond was given for payment of 10,000*l.* with a condition that the money should be paid on the obligee's procuring subscriptions for 9,000 shares in a company to be formed of many persons for the purpose of becoming assignees of a patent, and carrying on the patent process which patent contained a proviso that it should be void if assigned to more than five persons; held, that the bond was void, as being conditioned to perform an illegal act, and that the plaintiff was bound to know the terms of the patent, whereby an assignment to more than five persons was prohibited; at all events, he must be presumed to know the law of the land by which all monopolies, unless allowed by patent, were illegal.^c

*Bonds and agreements in general restraint of trade are illegal.^d So are bonds in restraint of marriage;^e and even a bond entered into for procuring marriage, or given after marriage, pursuant to a previous promise is illegal.^f So are bonds conditioned for the payment of money for appointments to offices, the sale of which is prohibited by statute.^g So are bonds given in respect of stock-jobbing transactions.^h But gambling transactions in foreign funds or securities are not prohibited by the statute.ⁱ Bonds given for money lost at games are illegal.^j So are bonds given in respect of usurious transactions.^k

Bonds given for simoniacal contracts are illegal. Simony is Simoniacal bonds. the corrupt presentation of any one to an ecclesiastical benefice for money, gift or reward.^l The first statutory provision on

^a Pole v. Harrobin, 9 East, 417, *n.*

^b Duvergier v. Fellowes, 1 Clark & Fen. 39. 10 B. & C. 826. (21 Eng. C. L. 177.)

^c *Id.*

^d See *ante*, 638.

^e Hartly v. Rice, 10 East, 22. Lowe v. Peirs, 4 Burr. 2233. Baker v. White, Ves. 215.

^f Roberts v. Roberts, 3 P. Wms. 75. Smith v. Aykwell, 3 Atk. 566.

^g 5 & 6 Edw. VI, c. 16. 53 Geo. III, c. 129. Law v. Law, Cas. temp. Talbot, 140. Palmer v. Bate, 6 Moore, 28. (6 Eng. C. L. 449.) Garforth v. Fearon, 1 H. Bl. 327.

^h 7 Geo. II, c. 8. 10 Geo. II, c. 8. Amory v. Meryweather, 2 B. & C. 573, (9 Eng. C. L. 183,) *ante*, 752.

ⁱ Henderson v. Bise, 3 Stark. 158. (14 Eng. C. L. 174.) Wells v. Porter, 2 Bing. N. C. 722. (29 Eng. C. L. 449.)

^j 9 Anne, c. 14, s. 1. Sigel v. Jebb, 3 Stark. 1. (14 Eng. C. L. 143.)

^k 12 Anne, st. 2, c. 16. See *ante*, 481. ^l 2 Bl. Com. 278.

this subject is the 31st of Eliz. c. 6, which enacts, "that if any person or persons shall for money, profit, or benefit, or by reason of any contract, bond, &c., directly or indirectly, present or collate to any benefice, &c., or bestow the same for any corrupt consideration, every such presentation, &c., shall be utterly void." And by sec. 8, "if any incumbent of any benefice shall *corruptly* resign or exchange the same, or shall corruptly take for resigning the same, any money or benefit, &c., then as well the giver as the taker shall lose double the value of the sum so given," and by the 12th Anne, stat. 2, c. 12, s. 2, "if any person for money or profit, or for any agreement or bond, &c., shall directly or indirectly in his own name or the name of any other person, procure the next presentation to any ecclesiastical living, and shall be presented or collated thereupon, every such presentation, &c., shall be void, and such agreement *shall be deemed a simoniacal contract, and it shall be lawful for the crown to present for that time only; and the person so corruptly accepting the living shall thenceforth be disabled to enjoy the same."

*756

It has been held that bonds given to pay money to charitable uses, on receiving a presentation to the living, or for the performance of duties which the incumbent was by law bound to perform, as that he shall reside upon the living, and keep the parsonage-house in proper repair, were not illegal; there being no corrupt consideration moving to the patron.^a And for a long series of years it was considered that a general bond to resign at the patron's request, was perfectly legal, if there was nothing to show that it was given for a corrupt consideration;^b until at length, the House of Lords, on a writ of error brought from a decision of the courts of King's Bench and Common Pleas, decided, by a majority of one, (the division being nineteen against eighteen,) that a general bond of resignation was illegal, as it was a benefit to the patron within the 31st Elizabeth, thereby reversing the decision of the courts below.^c The courts below, however, were reluctant to yield to the principle on which the above case was decided, and except in cases precisely similar they did not feel themselves bound by the authority of it; and accordingly they held that a *special* bond to resign in favor of a son or near relation of the patron was not within the 31st Eliz.^d But this doctrine was also overruled by the House of Lords in the celebrated case of

^a 2 Bl. Com. 279. Partridge v. Whiston, 4 T. R. 359.

^b Babington v. Wood, Cro. Car. 180. Jones v. Lawrence, Cro. Jac. 248. Bishop of London v. Ffytche, *infra*. A bond given by a schoolmaster, who had a freehold in his office, conditioned to resign at the request of his patron, has been held to be good. Leigh v. Lewis, 1 East, 391. 3 B. & P. 231.

^c The Bishop of London v. Ffytche, 1 East, 492, reported at length in Cunningham's Law of Simony. 3 Bro. P. C. 211.

^d Partridge v. Whiston, 4 T. R. 359. Lord Sondes v. Fletcher, 5 B. & A. 835. (7 Eng. C. L. 276.) Newman v. Newman, 4 M. & S. 66. But see Young v. Jones, 3 Doug. 97. (26 Eng. C. L. 46.)

Fletcher v. Lord Sondes, wherein it was decided with the concurrence of a majority of the judges, (there being eight against four,) that a bond conditioned to resign at the request of the patron for, the purpose of enabling him to present one of his two younger brothers, when capable of holding it, was simoniacal and void under the 31st Eliz.^a

*757

As the effect of this decision would be to invalidate all special bonds of resignation previously entered into, and to avoid all presentations founded thereon, and to subject the parties to penalties, in order to relieve persons who entered into such contracts on the faith of their being legal from such inconveniences, it was enacted, by 7 & 8 Geo. IV, c. 25, that no presentation to any spiritual office made before the 9th of April 1827, should be void on account of any agreement to resign when another person specially named should be qualified to take the same, and that persons having made such agreement should not be subject to any penalty on account thereof; but that such agreements made before the above-mentioned period should be valid in law.^b And a subsequent statute legalised all engagements to resign any benefice in favor of an uncle, son, grandson, brother, nephew, or grandnephew, of the patron or of one of the patrons by blood or marriage, not being merely a trustee, provided the engagement is entered into before the presentation, nomination, or collation, or appointment of the party entering into the same; and provided that one part of the instrument or writing, by which the engagement shall be made, be deposited, within the space of two months, in the office of the registrar of the diocese wherein the benefice is situate.^c

Contracts to resign made before 1827, to be valid

Engagements to resign in favor of relatives.

On the purchase of an advowson in fee, the incumbent being *in extremis*, but without any privity of the clerk, the next presentation was held not to be void, as being upon a simoniacal contract.^d So, the sale of the next presentation, the incumbent being *in extremis* within the knowledge of both contracting parties, but without the privity or with a view to the nomination of the particular clerk, has been held not to be void on the ground of simony within 31 Eliz. c. 6.^e

Purchase of the next presentation when the incumbent is *in extremis* is not void.

The sale of the advowson of a church which is full is not simoniacal by reason of the incumbency being at the time of the sale *voidable* at the election of the patron; and a conveyance under such a sale will pass the right of immediate presentation; but if the living be actually *void*, the right to the next presentation will not pass by a sale or conveyance, for it is no part of the advowson; it is disannexed.^f

^a *Fletcher v. Lord Sondes*, 1 Bligh, N. S. 144. 3 Bing. 598, (13 Eng. C. L. 64,) overruling S. C. in 5 B. & A. 835. (7 Eng. C. L. 276.)

^b 7 & 8 Geo. IV, c. 25.

^c 9 Geo. IV, c. 94.

^d *Barret v. Glubb*, 2 Black. 1052.

^e *Fox v. The Bishop of Chester*, (in Error,) 6 Bing. 1. (19 Eng. C. L. 11.) 1 Dow. & C. 416. 3 Bligh, N. S. 123; overruling S. C. in 2 B. & C. 635. (9 Eng. C. L. 208.) 4 D. & R. 93.

^f *Alston v. Atlay*, 6 Nev. & M. 686. 2 H. & W. 166.

*In an action for use and occupation by an incumbent against a tenant of the glebe lands, who has paid him rent, the defendant cannot give evidence of a simoniacal presentation of the plaintiff, in order to avoid his title.^a Where the occupier of land has entered into an agreement for a composition for tithes, he cannot set up as a defence to an action on such agreement, that the incumbent was simoniacally presented.^b

3.—*What will discharge a bond.*] In general whatever will discharge a covenantor from his covenant will have the same effect in respect of the obligor of a bond. The obligor of a bond therefore may be released from his obligation, if the performance of the condition was possible at the time of the execution of the bond, and afterwards became impossible by the act of God.^c So he may be excused by the act or omission of the obligee, as by a release.^d By an alteration or cancellation of the instrument without his knowledge or consent.^e And if a material alteration is made after the execution is perfected, even with the consent of all parties, a new stamp will be required to render it valid.^f But a new stamp will not be required by reason of an alteration made with the consent of all parties, *before* the execution be perfected.^g If the bond be joint, tearing off the seal of one obligor will avoid it as to all; but if several, tearing off the seal of *one* will not discharge the others.^h So, the obligor will be discharged by the performance being prevented through the conduct of the obligee.ⁱ By the intermarriage of the obligor and obligee.^j If there be two obligors *and the obligee marry one of them, the debt is extinguished,^k for a discharge of one joint and several obligor is a discharge of all. But a bond, conditioned for the payment of

*759
When a
bond will

^a Coxe v. Loxley, 5 T. R. 4.

^b Brooksby v. Watts, 6 Taunton, 333. (1 Eng. C. L. 404.)

^c Shep. Touch. 372. Bac. Ab. Cond. N. *ante*, 650.

^d *Ante*, 652.

^e *Ante*, 656.

^f Bathe v. Taylor, 15 East, 146.

^g Matson v. Booth, 5 M. & S. 223.

^h Collins v. Prosser, 1 B. & C. 682. (8 Eng. C. L. 183.)

ⁱ *Ante*, 652.

^j *Ante*, 655. A bond conditioned for the payment of an annuity to the wife of the obligor unless she should at any time molest him on account of her debts, or for living apart from her, is not discharged by a subsequent cohabitation, unless there appears a clear intention that it should be avoided in the event of a reconciliation. Wilson v. Mushett, 3 B. & Ad. 743. (23 Eng. C. L. 175.)

^k Co. Litt. 264, b. A bond given to a single woman does not upon her marriage vest absolutely in her husband, but being a mere *chose* in action, it must first be reduced into possession, and therefore he cannot sue alone upon it, but his wife must be joined. Bac. Ab. Feme. (K.) Rumsey v. George, 1 M. & S. 180. Milner v. Milnes, 3 T. R. 627. If the husband neglect to reduce it into possession during his life, his wife, if she survives him, and not his personal representatives, will be entitled to it. Co. Litt. 351, a. If the bond be given to the wife during coverture, or to the husband and wife, he may sue alone, or they may both join. Coppin v. —, 2 P. Wms. 497. And if he does not sue upon it in his lifetime, it will survive to her. Philliskirk v. Pluckwell, 3 M. & S. 393. 1 Rol. Ab. Bar. & Feme, (H.) And if a bond given to the wife alone be not put in suit during her life, the husband can sue upon it only as her administrator after her death. Bac. Ab. Obl. (D.)

money after the obligor's death, made to a woman in contemplation of the obligor's marrying her, and intended for her benefit if she should survive, is not released by their marriage. And if the marriage be pleaded in bar to an action of debt on the bond against the heir of the obligor, a replication stating the purposes for which the bond was made will be good, for they are consistent with the bond and condition.^a

be discharged by marriage.

If several are jointly and severally bound, the obligee makes one of them his executor, and he administers, this will operate as a release of all,^b for a personal action once suspended by the voluntary act of the party entitled to it is gone for ever.^c But if the obligee make the executor of one of the obligors his executor the debt is not discharged, for the executor holds it in another right, and he may sue the surviving obligor.^d

If the obligee make the obligor his executor, it will discharge the bond.

If one of several joint and several obligors make the obligee executor, and he administers and has assets, it operates as a discharge of all.^e But if he has no assets, the debt is not extinguished, and he may sue the heir if bound.^f And if the obligee does not administer, the debt is not released,^g and therefore where one of two joint and several obligors appointed the obligee and another person his executors, and the latter administered, but the obligee did not, and having died, he left the person who had administered his executor also; it was held that the executor might sue the obligor.^h In debt on a joint bond by three, it was held, that a release given by the obligee to the representative of one of the obligors, who died, was no answer to an action against the surviving obligors.ⁱ

Obligee made executor of the obligor.

*760

The bankruptcy of the obligor and a certificate will operate as a discharge of his liability under the bond, if the debt could be proved under the commission.^j So does a discharge under the insolvent debtors' act, if the bond is forfeited and inserted in the schedule, for when the bond is forfeited the penalty becomes a debt, from which the insolvent is entitled to be relieved by the order of the court.^k To an action against husband and wife, on a bond given by the wife before marriage, the husband's discharge under the insolvent act is a good plea; and his discharge is a discharge of the wife for ever.^l

Bankruptcy or insolvency of the obligor.

^a *Milbourn v. Ewart*, 5 T. R. 381.

^b *Needham's case*, 8 Co. 136.

^c *Chatham v. Ward*, 1 B. & P. 630. *Dorchester v. Webb*, Sir W. Jones, 345.

^d *Id.* See *Gleadow v. Atkin*, 2 C. & J. 548.

^e *Lock v. Cross*, 2 Lev. 72.

^f *Bac. Ab. Obligation*, (D.)

^g *Rawlinson v. Shaw*, 3 T. R. 557.

^h *Dorchester v. Webb*, *ante*, 750.

ⁱ *Ashbee v. Pidduck*, 1 Mees. & Wels. 564.

^j See *ante*, 320. *Clements v. Langley*, 5 B. & Ad. 372, (27 Eng. C. L. 97,) and the cases there referred to.

^k *Salmon v. Miller*, 3 B. & Ad. 596. (23 Eng. C. L. 151.)

^l *Lockwood v. Salter*, 5 B. & Ad. 303. (27 Eng. C. L. 82.)

SECTION X.

THE DECLARATION.

The plain-
tiff may
assign se-
veral
breaches.

*761

As most of the rules to be observed in framing the declaration in covenant^a are equally applicable to cases of debt upon a bond, a few observations only are required in this place. We have seen^b that at common law the obligee, on proof of a breach of the condition of a bond, might enforce the payment of the penalty, however disproportioned it might be to the damage actually sustained, and that the obligor could be relieved only by resorting to a court of equity; to remedy this inconvenience, it was enacted, by the 8 & 9 W. III, c. 11, s. 8, that "in all actions upon bonds, or any penal sum, for non-performance of any covenants or agreements *in any indenture, deed, or writing contained, the plaintiff may assign as many breaches as he may think fit, and the jury upon trial of such action shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned as the plaintiff upon trial of the issues shall prove to have been broken; and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions; and if judgment shall be given for the plaintiff on demurrer, or by confession of *nil dicil*, the plaintiff upon the roll *may* suggest as many breaches of the covenants and agreements as he shall think fit, upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justice or justices of assize, or *nisi prius*, of that county, to inquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby; in which writ it shall be commanded to the said justices, that they shall make a return thereof to the court whence the same shall issue, at the time in such writ mentioned; and in case the defendant, after such judgment entered, and before any execution executed, shall pay unto the court, to the use of the plaintiff, his executors, or administrators, such damages so to be assessed, by reason of all or any of the breaches of such covenants, together with costs of suit, a stay of execution of the said judgment shall be entered upon record; or if, by reason of any execution executed, the plaintiff, or his personal representative, shall be fully paid or satisfied all such damages, with costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands, or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but, notwithstanding, in each case

^a See *ante*, 673.

^b *Ante*, 741.

such judgment shall remain as a further security to answer to the plaintiff and his personal representative, such damages as shall be sustained for further breach of any covenant in the said indenture, &c., upon which the plaintiff may have a *scire facias*, upon the said judgment against the defendant, or against his heir, terre-tenant, or his personal representative, suggesting other breaches of the said covenants or agreements; and to summon him or them respectively, to show cause why execution shall not be had upon the said judgment; upon which there shall be the like proceeding, as was in the action of debt upon the said bond, for assessing damages upon trial of issues joined upon such breaches, or inquiry thereof, upon a writ to be awarded as aforesaid, and upon payment or satisfaction as aforesaid, of such future damages, costs, and charges, all further proceedings are again to be stayed; and so *toties quoties*; and the defendant, his body, lands, or goods, shall be discharged out of execution as aforesaid."

*762

Before this statute the plaintiff could only assign one breach of the condition; for if he assigned more, the declaration would have been bad for duplicity; because a forfeiture was incurred equally as much by one breach as by several.^a This enactment is calculated to give relief to the plaintiffs to the extent of the damage sustained, and to protect defendants against the payment of further sums than what are in conscience due. It has been held that the statute is compulsory on the plaintiff to proceed in the manner which it prescribes.^b The statute is not confined to cases where the covenants or agreements are in a distinct instrument from the bond; the condition of the bond is an *agreement in writing* within the statute.^c It extends also to a bond for the performance of an award.^d Where a bond upon the face of it appeared to be conditioned for the payment of a sum certain, but by an indenture of the same date, declaring the purposes for which the bond was executed, it was agreed that it should be lawful for the obligees in the bond to commence an action and to proceed to judgment whenever they should think fit, and upon judgment being obtained to issue execution, and that the judgment should be a security for the payment to the obligees, on demand, of all sums of money which then were or might thereafter become due to them. A judgment having been entered up by virtue of this deed, the obligees issued execution without assigning breaches or executing a writ of inquiry. Held, first, that this was a bond substantially conditioned for the performance of an agreement within the statute, and that the obligees ought to have assigned breaches.^e So a bond conditioned for the payment of a certain

In what cases breaches must be assigned pursuant to the statute.

*763

^a King v. Gole, Freem. 156. Symons v. Smith, Cro. Car. 176. Barnard v. Mitchell, 1 Vent. 114. 3 Salk. 108.

^b Hardy v. Bern, 5 T. R. 636. Roles v. Rosewell, *id.* 538. Drage v. Brand, 2 Wils. 377.

^c Collins v. Collins, 2 Burr. 820-6.

^d Welch v. Ireland, 6 East, 613.

^e Hurst v. Jennings, 5 B. & C. 650. (12 Eng. C. L. 343.)

sum by instalments, is within the statute.^a Where the obligee of an indemnity bond was sued for damages in respect of the matter of indemnity, it was held, that in an action against the obligor on his indemnity, he should assign as a breach not only the damages and costs recovered against him, but also his own costs sustained in defending the suit, though he had not then in fact paid the costs.^b

In what cases breaches need not be assigned.

*764

But the statute does not extend to bonds conditioned for the payment of a sum certain as *post obit* bonds,^c or other bonds for the payment of money, which are provided for by the 4 Anne, c. 16. s. 13, which empowers the court, pending an action on the bond, to discharge the defendant on payment of principal, interest, and costs;^d nor does it extend to bail bonds,^e or replevin bonds,^f or petitioning creditor's bond;^g and where judgment is entered on a warrant of attorney, it is not within the act, even though a bond be given;^h nor does it apply to cases where the damages assessed are calculated by the jury to meet and satisfy the entire condition of the bond.ⁱ A bond conditioned for the payment of a sum of money at the end of five years, with half-yearly interest in the mean time, with a proviso that, upon default in payment of interest, the principal shall be payable, was held not to be within the statute, as to assessment of damages.^j So it has been held, that breaches need not be assigned in an action brought after March 17th, 1829, on a bond executed in 1827, and conditioned for payment of 5,000*l.* on the 17th of March, 1829, with interest in the mean time, pursuant to the stipulations of an indenture bearing even date with the bond.^k

Mode of stating the condition and assigning breaches.

It is not necessary for the crown to assign breaches under the act; if any one breach be proved, the crown is entitled to judgment for the whole penalty.^l

The plaintiff may state the condition of the bond in his declaration, and assign several breaches under the statute, whereas at common law he could only assign one; or he may declare on the bond generally, in which case, if the defendant suffer

^a Willoughby v. Swinton, 6 East, 550. And after judgment obtained upon default of payment of one of the instalments, if a subsequent instalment be in arrear, the plaintiff cannot sue out execution for it, though within a year after such judgment, without first suing out a *scire facias* to revive it. *Id.*

^b Harrop v. Armitage, 13 Price, 441.

^c Murray v. the Earl of Stair, 2 B. & C. 82. (9 Eng. C. L. 33.) 2 D. & R. 278. Cordozo v. Hardy, 2 Moore, 220. (4 Eng. C. L. 416.) Wardell v. Fermor, 2 Camp. 285.

^d Ashbee v. Pidduck, 1 Mees. & Wels. 564.

^e Selby v. Lewis, Tidd's Practice, 584. Moody v. Pheasant, 2 B. & P. 446.

^f Middleton v. Bryan, 3 M. & S. 155.

^g Smithey v. Edmonson, 3 East, 22. Smith v. Broomhead, 7 T. R. 300.

^h Shaw v. Worcester, 6 Bing. 385. (19 Eng. C. L. 109.) Per Littledale, J., in James v. Thomas, 5 B. & Ad. 41. (27 Eng. C. L. 27.)

ⁱ 13 Price, 715.

^j James v. Thomas, 2 Nev. & M. 663. 5 B. & Adol. 40. (27 Eng. C. L. 26.)

^k Smith v. Bond, 10 Bing. 125. (25 Eng. C. L. 56.) 3 M. & Scott, 523.

^l Rex v. Peto, 1 Y. & J. 171.

judgment by confession or *nil dicit*, or the plaintiff have judgment on demurrer, he may suggest breaches on the roll.^a So after a plea of *non est factum*, and that the bond was obtained by fraud and covin, where breaches are not assigned in the declaration, the plaintiff may suggest them under the statute, in making up the issue.^b

There has been some contradiction in the books as regards the *expediency* of setting out the condition and breaches in the declaration, or waiting till the replication or other stage in the cause. In practice it is now most usual not to state the condition or breaches in the declaration; but there may be cases in which it may be advisable to state them, as where a plea not leading to an issue or the breach, as *non est factum*, or the like, or where a judgment by default is expected, for in the latter case some delay would be avoided, and the plaintiff would not have to prove, nor could the defendant deny the truth of the breach, or the execution of the inquiry.^c(1)

^a 1 Saund. 58. 2 *Id.* 187, c. 5th Ed. *Walcot v. Goulding*, 8 T. R. 126.

^b *Homfray v. Rigby*, 5 M. & S. 60. *Ethersey v. Jackson*, 8 T. R. 255.

^c 1 Ch. Pl. 369, 6th Ed. *Barwise v. Russell*, 3 C. & P. 608. (14 Eng. C. L. 480.) *Hodgkinson v. Marsden*, 2 Camp. 121. Where, in debt on bond, a plaintiff has suggested breaches on the roll, pursuant to the above statute, the court, after plea of *non est factum* pleaded, refused a rule to show cause why some of them should not be struck out, or judgment by default suffered on them, with entry of nominal damages; for, by the statute, the plaintiff may suggest breaches on every part of the condition, and the jury are to inquire of the truth of them; and the defendant had another course, viz. by pleading performance of the condition, and suffering judgment by default on the replication. *Canterbury (Archbishop) v. Robertson*, 3 Tyr. 419; 1 C. & M. 181.

If the defendant plead any plea on which the plaintiff might at common law have taken issue in his replication, without assigning a breach of the condition of the bond, the plaintiff may still take such issue, and may enter a distinct and separate suggestion of the breaches under the statute, but he cannot incorporate such issue and such suggestion in one and the same replication. But if the defendant plead any plea which made it necessary at common law for the plaintiff to assign a breach in his replication, as, for instance, the general performance, the plaintiff must still assign the breach in his replication, with this difference, that now he may assign several breaches under the statute, whereas at common law he could assign only one. If only one be assigned in the replication, it is not necessary to state it in terms to be according to the form of the statute. *Tombs v. Painter*, 13 East, 1. 1 Ch. Pl. 370. 2 Saund. 267, b. *De la Rue v. Stewart*, 2 N. R. 362. *Plomer v. Ross*, 5 Taunt. 386. (1 Eng. C. L. 126.) 2 Saund. 187, b.

(1) (*Rees v. Tichenor*, 1 Miles, 183. This was an action by a sheriff on a bond of his deputy conditioned for the faithful discharge of his duties. Per Jones, J. The usual course of pleading upon a bond like this is for the plaintiff to declare in debt for the penalty. The defendant then claims oyer of the condition and pleads performance or *non damnificatus* generally according to the nature of the stipulation. The plaintiff in his replication sets forth the particular breaches, and the defendant rejoins either by way of traverse tendering an issue or by way of confession and avoidance, or he demurs.

The plaintiff may, however, set out the condition and assign the particular breaches in his declaration, but by this course he gives the defendant the advantage of pleading, with the leave of the court, any number of pleas to such breach.

If the plaintiff assigns the breaches specifically in his declaration, the general plea of performance or of *non damnificatus*, on which no issue can be taken, is bad. The defendant must answer each breach specifically assigned specially.

In regard to the stipulation to indemnify and save the plaintiff harmless, &c., the rules of pleading allow the defendants to plead negatively.)

Assigning
breaches.

- *The breach of the condition should be assigned with certainty and particularity; but the superaddition of immaterial allegations will not vitiate a breach otherwise well assigned.^a Where to debt on bond conditioned to pay money on a day specified, according to the terms and proviso contained in a certain indenture, and for the performance of covenants therein contained, the defendant pleaded, that there were no negative or disjunctive covenants in the indenture, and that he paid the money mentioned in the condition on the day therein specified, according to the effect thereof, and performed all the covenants and provisos in the indenture on his part to be performed. The plaintiff, in his replication, took issue generally on the non-payment of the money, and concluded to the country. On special demurrer, assigning for causes, that it should have concluded with a verification, and that no breach of the condition was assigned according to the statute; held, that such replication was good, as the only point in issue was the payment of the money, and as the plaintiff had therein denied the whole substance of the defendant's plea.^b

*766

Assignment of breaches in debt on bond to perform an award in the words of the award generally, held sufficient, although the plaintiff did not show that the defendant had become enabled to carry it into effect by the circumstances having taken place on which it was to have been performed, the award being held to assume that they had, and the fact of such circumstances not having taken place, as it lay properly within the defendant's knowledge, should be pleaded and set out by him.^c A plea to a declaration on a bond, conditioned, amongst other things, for the payment of 3000*l.*, that all the sums of money which became due on the bond were paid, may be replied to generally by a general denial of the words of the plea, without assigning any specific breach.^d

To debt on bond, the condition of which was, that *A. B.* should deliver a true account of all moneys received by him in pursuance of his office, the defendant pleaded performance generally. The plaintiff, in his replication, assigned for breach, that *A. B.* was requested to deliver a true account of all moneys received by him in pursuance of his office, but refused so to do. Held, on special demurrer, that this assignment of the breach was bad, in not alleging, that *A. B.* had received any moneys by virtue of his office.^e

If the condition of the bond is, "that *A.* shall not embezzle any money that shall come to his hand on account of his master, it is necessary in an action against the obligor, to state in

^a *Stothert v. Goodfellow*, 1 N. & Man. 263.

^b *Darbishire v. Butler*, 5 Moore, 198. (16 Eng. C. L. 393.)

^c *Wilcocks v. Nicholls*, 1 Price, 109.

^d *Turner v. M'Namara*, 2 Chitty, 697. (18 Eng. C. L. 462.)

^e *Serra v. Fyffe*, 1 Marsh. 441, (4 Eng. C. L. 346,) *nom.* *Serra v. Wright*, 6 Taunt. 45. (1 Eng. C. L. 304.)

the breach what particular sum of money was embezzled, and how or from whom it was received.^a To debt on bond, conditioned that one *B. R.* should account for and pay over to the plaintiffs, as treasurers of a charity, such voluntary contributions as he should collect for the use of the charity, the defendants pleaded general performance; the plaintiffs replied, that *B. R.* had *received divers sums amounting to a large sum, viz, 100*l.*, from divers persons for divers voluntary contributions for the use of the said charity, which he had not accounted for or paid over, &c.: it was held by the court, on special demurrer, that the replication was sufficiently certain.^b *767

SECTION XI.

THE PLEADINGS.

THE plea of *non est factum* only operates as a denial of the execution of the deed in point of fact; all other defences must be specially pleaded, including matters which make the bond absolutely void, as well as those which render it voidable.⁽¹⁾ The rules and observations respecting the pleadings in actions of covenant, will, in general, apply to the pleadings in debt on bonds; what will be a good defence in this action may be easily collected from what has been already stated on the subject. It may be observed that, in order to take advantage of a defect not apparent on the face of the declaration, the defendant must crave oyer of the bond and condition, or either of them.^d But if oyer of the bond only be craved, the defendant is not entitled to oyer of the condition unless he craves that also, for the obligation and condition are distinct instruments.^e Though it is a general rule, that matters inconsistent with, or contrary to, the deed, cannot be pleaded in an action thereon, yet the obligor may plead any matter which shows that the bond is void, though inconsistent with the terms of the condition.^f

In debt upon an obligation without any condition, satisfaction must be pleaded to have been by deed.^g So where to debt on bond, which contained a condition that the defendant

^a Jones v. Williams, Dougl. 214.

^b Barton v. Webb, 8 T. R. 459.

^c R. Gen. H. T. 4 W. IV. See *ante*, 696, as to what may be given in evidence under this plea.

^d Cotton v. Goodbridge, 2 Bl. 1108. Samuel v. Evans, 2 T. R. 575.

^e 1 Saund. 9, b. See *ante*, 690.

^f Paxton v. Popham, 9 East, 421. Collins v. Blantern, 2 Wils. 347. See Phillips v. Davies, Hurlst. on Bonds, 137, a.

^g Preston v. Christmas, 2 Wils. 86.

(1) (*Nil debet* is not a good plea in an action of debt on bond. Allen v. Smith, 7 Halsted, 160.)

Non damnificatus.

*should not open a shop within a certain distance of premises demised in a lease, and the defendant pleaded that he opened a shop by the license of the plaintiff: held, that such plea was bad, on general demurrer, on the ground that a license, after breach, was not good, unless by deed.^a *Non damnificatus* cannot be pleaded to debt on bond, conditioned for the payment of a sum of money at a certain day, though it appear by the condition that the bond was given by way of indemnity.^b So a plea that it was given as an indemnity to the plaintiff's testator against another bond, and not damnified, was held bad.^c So a plea that, after the execution of the bond, the plaintiff took from the defendant more than legal interest, was held bad.^d

If a declaration in debt on a bond conditioned for the payment of principal and interest, assigns a breach in non-payment of the principal only, a plea is bad, specially demurred to, which avers payment of both principal and interest.^e

Payment or performance.

If the defendant plead payment or *performance*, he must show that the condition was strictly performed; but the payment or performance need not in all cases be in accordance with the *letter* of the condition, a substantial performance, which will carry into effect the intention of the parties, will be sufficient. If a *particular* day be named for the payment of money or the performance of any other act, it will be a sufficient compliance with the condition, if the money be paid or the act performed *on* or *before* the day mentioned in the condition, but the payment or performance must be pleaded to have been *on* the day,^f and evidence of payment *before* the day will sustain such a plea; and the reason is, that if the plea state a payment *before* the day, and issue be taken thereon and found for the plaintiff, yet he cannot have judgment; for the issue is immaterial, since, notwithstanding this verdict, payment might have been made *on* the day; but if the issue had been found for the *defendant, it would probably be cured by the verdict.^g Where a bond is conditioned for payment of money *on* or *before* a certain day, the defendant may plead payment *before* the day if the fact be so; and the plaintiff may reply that it was not paid at the particular day mentioned in the plea, *nor at any time before or after that day.*^h

*769

Payment after the day.

The bond being forfeited by the non-payment of the money on the day mentioned in the condition, a payment *after* the day could not be pleaded at the common law; but now, by stat. 4 Anne, c. 16, s. 12, "where debt is brought upon any bond, with

^a *Sellers v. Bickford*, 1 Moore, 460. (4 Eng. C. L. 8.)

^b *Holmes v. Rhodes*, 1 B. & P. 638.

^c *Mease v. Mease*, Cowp. 7.

^d *Nichols v. Lee*, 3 Anst. 940.

^e *Bishton v. Evans*, 1 Gale, 76. 2 C. M. & R. 12.

^f 2 Saund. 47, t. Co. Lit. 212, b. *Bigland v. Skelton*, 12 East, 436. *Hodson v. Bell*, 7 T. R. 97. *Sturdy v. Arnaud*, 3 T. R. 601. *Everett v. Eyre*, 2 Bing. 166. (9 Eng. C. L. 363.)

^g 2 Saund. 47, t. 5th Ed.

^h 2 Saund. 48. *Fletcher v. Herrington*, 2 Burr. 944. *Willes*, 587, n, a. 1 Bl. 210.

a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors, or administrators have, *before the action brought*, paid to the obligee, his executors, or administrators, the principal and interest due by the condition or defeasance of such bond, though such payment was not made strictly according to the condition or defeasance, yet it may be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition and defeasance, and had been so pleaded." (1)

This enactment is, however, confined to an *actual* payment; therefore a *tender* and refusal of principal and interest *after* the day cannot be pleaded.^a A plea of payment of *part* of the sum mentioned in the condition, *after* the day, is bad on demurrer.^b

If the act to be done by the obligor, is in its nature *transitory*, and no time is limited for that purpose, it ought to be performed in a convenient time, and a request is unnecessary. But if the condition be for the performance of an act that is *local*, and to which both the concurrence of the obligor and obligee is necessary, and no time is mentioned for that purpose, the obligor hath during his life to perform it, unless hastened *by request.* If the bond is conditioned for the payment of money or for the performance of a collateral act *on demand*, a demand is necessary before the obligee can put the bond in suit; but if there be a duty to pay the money or perform the act, bringing the action will be a sufficient demand.^d

Performance must be according to the terms of the condition; as where the obligor was bound to leave his children 200/. jointly, and he gave his eldest son an estate in land worth more than 50/., and his other three children 50/. a piece, it was held not to be a performance of the condition, though the parties interested had derived more benefit therefrom than they should from a strict performance.^e Payment by a collector of taxes of money received by him to the account of a different year from that for the service of which they were collected, is a performance of the condition of the bond for due payment.^f

A literal compliance with the terms of the condition is not

^a B. N. P. 171. Dixon v. Parkes, 1 Esp. 110. 2 Saund. 48. Pleas of payment are technically termed *solvit ante diem*, *solvit ad diem*, and *solvit post diem* respectively. Heretofore it was not unusual to plead *solvit ad diem* and *solvit post diem* at the same time, but by Reg. Gen. H. 4 W. IV, both these pleas are not allowed.

^b Ashbee v. Pidduck, 1 Mees. & Wels. 564, *ante*, 764.

^c Co. Lit. 208, b.

^d See Gibbs v. Southan, 5 B. & Ad. 911, (27 Eng. C. L. 235,) *ante*, 742. Carter v. Ring, 3 Camp. 450, *ante*, 742. 1 Saund. 33, a.

^e Taylor v. Bird, 1 Wils. 280. And see Irish Society v. Needham, 1 T. R. 486. Haydon v. Wilshire, 3 T. R. 372.

^f Collins v. Gwyne, 9 Bing. 544. (23 Eng. C. L. 375.)

(1) (Summers v. Loder, 7 Halsted, 104.)

sufficient, unless the performance be in accordance with the intent of the parties.^a

SECTION XII.

DEBT ON BAIL BOND.

	PAGE		PAGE
1. The nature and requisites of a bail bond.		3. Assignment of a bail bond, and proceedings thereupon.	
2. When it may be put in suit.	773		774

***771** 1.—*The nature and requisites of a bail bond.*] AT common law the sheriff was not obliged to take bail from a defendant arrested upon mesne process, unless he sued out a writ of mainprize; but by the 23 Hen. VI, c. 9, it is enacted, “that *sheriffs, under-sheriffs, bailiffs of franchises and other bailiffs, shall let out of prison all manner of persons by them arrested, or being in their custody by force of any writ, bill, or warrant, in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons, having sufficient within the counties where such persons are let to bail, to keep their days in such place as the said writs, bills, or warrants, shall require; persons in ward by condemnation, execution, *capias utlagatum*, or *excommunicatum*, surety of the peace, or by special commandment of any justice excepted. And no sheriff, &c., shall take, or cause to be taken or made, any obligation for any cause aforesaid, or by color of their office, but only *to themselves*, of any person, nor by any person, which shall be in their ward by course of law, but upon the name of their office, and upon condition that the prisoners shall appear at the day and place contained in the writ, &c.; and if any sheriffs, &c., take any obligation in other form by color of their office, it shall be void.”^b

In what cases the sheriff may take a bail bond

The sheriff has no authority under the above statute to take a bond for the appearance of persons arrested by him under process issuing upon an indictment at the quarter sessions for a misdemeanor; he can only take a recognisance for their appearance.^c But though it was formerly considered that the statute did not authorise a sheriff to take a bail bond from a defendant who is in custody under an attachment for non-

^a *Sherman v. Tylly*, Cro. Car. 597. *Bache v. Proctor*, Doug. 382. *Edwards v. Brown*, 1 C. & J. 307.

^b If the defendant tender a bail with sufficient sureties within the bailiwick, and the sheriff refuse to accept it, he will be liable to an action on the case. 1 Saund. 61, b. See *Lovell v. Plomer*, 15 East, 320.

^c *Bengough v. Rossiter*, 4 T. R. 505. 2 H. Black. 418, 426, 435.

payment of costs, because such a process was in the nature of an execution,^a it has been determined by later authority, that a sheriff may take a bond in such cases; for as the non-payment of money creates a civil right, an attachment issued to enforce that right must be considered in the nature of a mesne process.^b It was also formerly considered that a sheriff could not take bail, on an attachment out of Chancery,^c but in a modern case ^{*772} the court held that such bonds were neither compellable to be taken, nor prohibited by the statute; but that they were good at common law; and that whether they be taken or not, was in the discretion of the sheriff as regulated by the practice of the court.^d

The security required by the statute is a *bond*; therefore, an agreement in writing not under seal is void; and the bond ^{Requisites of a bail bond.} must be made to the *sheriff himself*, as such by his name of office, and not to his *bailiffs*, for though the statute mentions the *bailiff* of a franchise it means those officers who have the return of process; but where it is directed to the sheriff, the bond must be made to him. And the conditions of the bond must be for the appearance of the party at the return of the writ, and for no other purpose; so that if there be any other condition expressed in the bond, or the bond be single or with an impossible condition, or if it be executed before the condition is filled up,^e it is void. The statute does not require the nature of the action to be inserted in the condition of the bond; if it sets forth the names of the parties and the time and place of appearance *substantially*, it is sufficient; therefore a mere informality or variance in those particulars will not vitiate the bond.^f Where under an original writ in a plea of *trespass on the case upon promises*, the sheriff took a bail bond conditioned for the defendant's appearance in a plea of trespass, it was held sufficient.^g So where the writ was to appear before the king, *wheresoever he should then be in England*, and the sheriff took a bail bond for the party's appearance before the king at Westminster on the day named in the writ; held, that it was a substantial compliance with the statute, so as to entitle the assignee of the sheriff to recover on the bond.^h But where a bail bond, in reciting the writ of *capias*, stated "that a copy of ^{*773} the writ was duly delivered to —," omitting the name

^a *Phelps v. Barrett*, 4 Price, 23.

^b Per Holroyd, J., *Lewis v. Morland*, 2 B. & A. 65.

^c *Studd v. Acton*, 1 H. Bl. 469.

^d *Morris v. Hayward*, 6 Taunton, 569; (1 Eng. C. L. 435;) recognised by Bayley, J., in *Lewis v. Morland*, 2 B. & A. 63, who said it was at variance with *Phelps v. Barrett*, *supra*, 2 Saund. 59, a. 5th Ed.

^e 2 Saund. 59, b. 60. *Rogers v. Reeves*, 1 T. R. 418. *Samuel v. Evans*, 2 T. R. 569. *Graham v. Crashaw*, 3 Lev. 74. *Powell v. Duff*, 3 Camp. 181. *Thompson v. Rock*, 4 M. & S. 338.

^f 3 Saund. 60. *Villiers v. Hastings*, Cro. Jac. 286. *Kirkebridge v. Wilson*, 3 Lev. 123. *Atkinson v. Saunderson*, Tidd, 223.

^g *Owen v. Nail*, 6 T. R. 702.

^h *Jones v. Stordy*, 9 East, 55.

of the defendant and likewise omitted his name in the statement of the condition of the bond; it was held to be insufficient, and the court in an action of escape brought against the sheriff, would not supply the deficiency.^a

Although the statute uses the word "sureties," the bond will not be void if taken with one surety only.^b If more than two sureties be tendered and two of them are each worth property to the amount of the penalty in the bond, it is immaterial what property the others have.^c Where the writ issued against two defendants, and the sheriff took a bail bond conditioned for the appearance of one only, it was held no ground of demurrer to a declaration on the bond.^d

The 12 Geo. I, c. 29, s. 2, directs that the sheriff shall take bail for the sum indorsed upon the writ and no more. In practice however it is taken in double the sum sworn to; and it will be no objection to the bond that it be taken in a greater amount.^e But an attorney ought not to prepare a bail bond for a larger sum than is requisite according to the practice of the court.^f

2.—*When a bail bond may be put in suit.*] If the defendant do not put in special bail within eight days after the execution of the writ inclusive of the day of execution, the bail bond is forfeited and may be put in suit.^g

A render of the principal will not discharge the bail bond.

*774

Before the uniformity of process act, (2 W. IV, c. 39,) a render of the principal might have been made at any time before the return of the writ; and that render would operate to discharge the bail bond;^h but now writs are returnable immediately after they are executed, and the sheriff may then be ruled to return them; therefore the effect of the bail bond is, that if special bail be not put in, the plaintiff may proceed either against the sheriff or on the bond, for the condition of the bond is to put in special bail, consequently a surrender of the principal within eight days will not discharge the bond; for there would be great inconvenience if the sheriff might be called upon to return the writ, and that the defendant might at the same time discharge the bail bond by a render, and

^a *Holding v. Raphael*, 1 Harr. & Woll. 571. 5 N. & M. 655.

^b 2 Saund. 61, c. Beawsage's case, 10 Co. 101.

^c *Id.* Matson v. Booth, 5 M. & S. 323.

^d *Grottick v. Phillips*, 9 Bing. 721. (23 Eng. C. L. 438.) 3 Moor. & S. 132.

^e *Norden v. Horsley*, 2 Wils. 69.

^f *Wingrave v. Godmond*, 6 C. & P. 66. (25 Eng. C. L. 284.) *Tindal*. The statute applies only to securities given to the sheriff or other officer; therefore bonds given to the plaintiff may be valid though not in the form prescribed by the statute. *Hall v. Carter*, 2 Mod. 304. 2 Saund. 60.

^g *Hilary v. Rowles*, 5 B. & Ad. 460. (27 Eng. C. L. 105.) 2 Dowl. 201. *Alston v. Underhill*, 1 C. & M. 497.

^h But there could be no render without the consent of the sheriff, and it was optional with him whether he would accept the surrender or not. *Hamilton v. Wilson*, 1 East, 383. *Jones v. Lander*, 6 T. R. 753. *Plimpton v. Howell*, 10 East, 100. *Lewis v. Davies*, 5 Moore, 267. (16 Eng. C. L. 399.)

put a stop to proceedings either against the sheriff or the bail.^a Where a bail bond has been taken and special bail has not been put in within eight days, the plaintiff may declare *de bene esse*, and if he neglects to do so, he is not entitled to have the bail bond stand as a security.^b The bail bond is discharged by the defendant's giving a cognovit for the payment of the debt and costs without the knowledge of the bail.^c But where a cognovit was taken with the consent of the bail, and the debt is not paid pursuant to the undertaking, it was held that the plaintiff should give the bail notice that the cognovit is unsatisfied before he could commence proceedings against him.^d After the bond is forfeited, giving time to the principal will not discharge the bail.^e

3.—*Assignment of a bail bond and proceedings thereupon.* [The sheriff must assign the bail bond if the plaintiff requires it] At common law a bail bond was not assignable so as to give the plaintiff a right to sue upon it in his own name, but the 4 & 5 Anne, c. 16, s. 20, enacted, "that if any person shall be arrested by any writ, bill, or process, issuing out of any of the king's courts of record at Westminster, at the suit of any common person, and the sheriff, or other officer takes bail from such person, the sheriff, or other officer, at the request and costs of the plaintiff in such action or suit, or his lawful attorney, shall assign to the plaintiff in such action the bail bond, or other security taken from such bail by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses, which may be done without any stamp provided the assignment so indorsed be duly stamped before any action brought thereupon; and if the bail bond or assignment, or other security taken for bail, be forfeited, the plaintiff, in such action, after such assignment made, may bring an action thereupon in his own name; and the court, where the action is brought, may, by rule of the same court, give such relief to the plaintiff, and defendant in the original action and to the bail, as is agreeable to justice, and such rule shall have the effect of a defeasance to the bail bond."^f *775

The provisions of this statute do not apply to proceedings in a court of equity; therefore a bail bond given by a party attached for contempt in not putting in an answer in Chancery is not assignable. The creditor's remedy is by action in the name of the sheriff.^g The assignment of the bond may be made by the sheriff himself, or by the under-sheriff in the name of the sheriff.^h It seems that the seal of office will be

^a *Hodgson v. Mee*, 1 Harr. & Woll. 396. 5 N. & M. 309.

^b *Id.* *Call v. Thelwell*, 1 Gale, 16. 1 C. M. & R. 780. *Staines v. Stoneham*, 2 C. M. & R. 658. 1 Gale, 397.

^c *Farmer v. Thorley*, 4 B. & A. 91. (6 Eng. C. L. 356.)

^d *Clift v. Gye*, 9 B. & C. 492. (17 Eng. C. L. 411.)

^e *Woesman v. Price*, 1 C. & M. 359.

^f By 5 Geo. IV, c. 41, the stamp duty upon the assignment of the bond is repealed.

^g *Meller v. Palfreyman*, 4 B. & Ad. 146. (24 Eng. C. L. 42.) 1 Nev. & M. 696.

^h 2 Saund. 61. *Kitson v. Fagg*, 1 Stra. 60.

sufficient to give validity to the assignment, whoever may have signed it; it is therefore no objection that it was signed by one of the under-sheriff's clerks.^a The assignment must be executed in the presence of two disinterested witnesses; but it is not necessary that they should both subscribe their names in the presence of the officer assigning.^b The plaintiff in the action must not be one of the witnesses.^c

*776 An action on the bail bond by the assignee must be brought in the court in which the original suit was commenced, even though it be an inferior court.^d But if the sheriff himself puts the bond in suit, the action may be brought in any court.^e By Reg. Gen. H. T. & W. IV. r. 30, proceedings on the bail bond may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more. But where several actions are brought on the same bail bond, it is too late, after verdict, to move to stay proceedings on payment of the costs of one action only.^f When the sheriff is ruled to bring in the body, proceedings cannot be taken on the bail bond until that rule has expired.^g A declaration *de bene esse*, in the original action, is not a waiver of a previously commenced suit on the bail bond.^h

Liability
of the bail.

The bail are liable to the plaintiff for the whole debt (without regard to the sum sworn to) and costs to the full extent of the penalty in the bond.ⁱ *Primâ facie*, the bail to the sheriff are liable to the charges of putting in bail above; if they apply to an attorney to put in bail above, they are liable for their expenses, but not for the subsequent expenses of the suit.^j It seems that where the bail are let in upon terms, to try the cause of the principal, the money levied to abide the event, and the bail bond to stand as a security, the bail are not liable beyond the penalty on the bond, although the debt and costs exceed

^a Middleton v. Sandford, 4 Camp. 36. Harris v. Ashby, S. N. P. 572, *n. contra*. Kitson v. Fagg, *supra*.

^b Phillips v. Barlow, or Barber, 1 Bing. N. C. 433. (27 Eng. C. L. 446.) 6 C. & P. 781. (25 Eng. C. L. 649.) 1 Scott, 322.

^c White v. Barrack, 1 Mees. & Wels. 425. 2 Gale, 57.

^d Morris v. Rees, 2 Bl. 838. 3 Wils. 348. Walton v. Bent, 3 Burr. 1223. 2 Saund. 61. Chesterton v. Middlehurst, 1 Burr. 642. Per Taunton, J., in Meller v. Palfreyman, 4 B. & Ad. 149. (24 Eng. C. L. 42.) Even before the new rules the defendant could not object, under *non est factum*, that the action was brought in a wrong court. Wright v. Walmsley, 2 Camp. 396.

^e Reg. Gen. H. T. & W. IV, reg. 28. Before this rule it was held by the Court of King's Bench, in Donatty v. Barclay, 8 T. R. 152, that an action even by the sheriff or his officer must be brought in the court where the original suit was commenced; but it was held otherwise in Newman v. Faucitt, 1 H. Bl. 631. Yorke v. Ogden, 8 Price, 174. See 2 Saund. 61. 1 S. N. P. 574.

^f Johnson v. Macdonald, 2 Dowl. P. C. 45.

^g Reg. Gen. H. T. & W. IV. Whittle v. Oldaker, 7 B. & C. 478. (14 Eng. C. L. 68.)

^h Vernon v. Turley, 2 Gale, 81. 1 Mees. & Wels. 316.

ⁱ Stevenson v. Cameron, 8 T. R. 28. Clark v. Bradshaw, 1 East, 91. Orton v. Vincent, Cowp. 71. Mitchel v. Gibbons, 1 H. Bl. 76.

^j Hector v. Carpenter, 1 Stark. 190. (2 Eng. C. L. 351.)

the same after the trial, and the plaintiff's debt would have been fully covered by the security, when the bail were first let in to try upon terms.^a

*SECTION XIII.

*777

THE DECLARATION.

THE name of the person against whom the writ is stated to have been issued, should be stated accurately in the declaration.^b Where the declaration in reciting the writ stated that the sheriff, to whom it was directed, was commanded to take "the said defendant, *T. A.* to answer the plaintiffs in a plea of trespass, and also to a bill of the plaintiffs against the said defendants;" held, on special demurrer, that it was ill, in not clearly showing against whom the writ was issued, or who was the defendant in the plaintiff's suit on the writ.^c Where the declaration stated that the writ was against the said *W. Cocken* by the name of *W. Cocker*, after verdict judgment was arrested, on the ground that such a misnomer on the writ made the arrest illegal and the bail bond void, there not being an averment that the defendant was known as well by one name as the other.^d But a declaration stating the writ in its very terms, and then averring that the *now* defendant was and is known as well by the one name as the other, would be good.^e

It is not, however, necessary that the declaration should aver that the writ on which the defendant was arrested was issued on an affidavit of debt, and indorsed with the sum sworn to, for the court will presume that all the proceedings antecedent to the bail bond were regular.^f

Before the uniformity of process act, (2 W. IV, c. 39,) it was considered sufficient to declare on the bond according to its legal effect, without setting forth the words of the condition.^g

^a *Goss v. Harrison*, 3 Smith, 354.

^b *Scandover v. Warne*, 2 Camp. 370. Where the plaintiff declared in the commencement of his declaration as assignee of the sheriff, and then set forth a bond to himself, it was held to be no ground of demurrer. *Reynolds v. Walsh*, 1 C. M. & R. 580.

^c *Large v. Attwood*, 1 D. & R. 551.

^d *Finch v. Cocken*, 2 C. M. & R. 196. 1 Gale, 130. 3 Dowl. 678. No advantage can be taken at the trial of a misnomer of the plaintiff, though there be a person of the name erroneously used; it is a question of fact who is the real plaintiff. *Moody v. Aslatt*, 1 C. M. & R. 771. 1 Gale, 47.

^e *Id.* 2 Ch. Pl. 392.

^f *Sharpe v. Abbey*, 5 Bing. 193. (15 Eng. C. L. 413.) *Dorington v. Bucknell*, 11 Moore, 445. (23 Eng. C. L. 415.) *Wilcoxon v. Nitingale*, 4 Bing. 501. (15 Eng. C. L. 57.) 2 M. & P. 312.

^g *Bonfellow v. Steward*, 3 Moore, 214. (4 Eng. C. L. 431.) *Shaw v. Lee*, 3 Stark. 76. (14 Eng. C. L. 166.) *Holroyd*.

"but now the condition should be set forth verbatim.^a The writ in the original action, the court out of which it issued, and the condition, should be set out accurately. Where the condition set out on the record was, to answer the plaintiff in a plea of trespass, and also to a plea of the plaintiff to be exhibited against the defendant for 60*l.* upon promises, it was held to be a fatal variance.^b So where the writ set out was "to appear before his majesty's justices of the bench at Westminster," and the condition was to appear before the King at Westminster, it was held a fatal variance, for there were different courts.^c But where the declaration stated the arrest to be by virtue of a *capias* sued out of the court of our lord the king, before Sir W. D. B and others, then his majesty's justices of the bench at Westminster, and averred the condition of the bond to be, that if the principal should appear according to *the exigency of the said writ*, in the said court, &c., the bond was void, and the breach was the non-appearance *according to the exigency of the said writ*. On the production of the bond, the condition was for the appearance of the principal "*before our sovereign lord the king at Westminster*, on, &c.," to answer the plaintiff in a plea of trespass, and also to answer him according to the custom of the king's court of *Common Bench*; it was held no variance.^d

It may be alleged that the sheriff *assigned* the bond to the plaintiff according to the statute, without adding that the assignment was made under the hand and seal of the sheriff;^e and though the statute requires the indorsement to be made in the presence of two witnesses,^f it is not necessary to set forth the names of the witnesses in the declaration.^g If, however, it appear on the face of the declaration that the assignment was

*779 ^aattested by one witness only, it will be demurrable.^h As the assignment is not by deed, a profer is unnecessary.ⁱ

^a 2 Ch. Pl. 294.

^b *Baker v. Newbegin*, R. & M. 93. (21 Eng. C. L. 389.) Abbott.

^c *Renalds v. Smith*, 6 Taunt. 551. (1 Eng. C. L. 179.) 2 Marsh. 258.

^d *Crofts v. Stockley*, 5 Bing. 32. (15 Eng. C. L. 356.) 2 M. & P. 81. See Jones

s. *Sturdy*, 9 East, 55.

^e *Dawes v. Papworth*, Willes, 408. 2 Saund. 61.

^f See *ante*, 775.

^g *Lease v. Box*, 1 Wils. 192.

^h *Neat v. Mills*, Fort. 371. Willes, 409. n.

ⁱ *Lease v. Box*, *supra*.

SECTION XIV.

THE PLEADINGS.

A PLEA of *non est factum* puts in issue the execution of the *Non est* bond only; but under this plea the defendant may show that *factum*, the bond was void.^a The defendant may plead that no process issued against the principal, or that the debt was levied on the principal since the commencement of the action.^b So in an action by the assignee of the sheriff the defendant may plead that the bond was not assigned according to the statute.^c It is a good plea that no affidavit of debt was *made*;^d though a plea that no affidavit of debt was *filed*;^e or that no *proper* affidavit had been made,^f is bad.

The practice of the court, unless it goes to the merits of the defence, cannot be pleaded.^g The defendant cannot plead that the cause was out of court for want of a declaration before the assignment of the bond was taken;^h nor can matters of defence in equity, or merely founded on the discretion of the court, be pleaded;ⁱ as that the action was brought for the benefit of, or as trustees for, the sheriff's officer.^j

*The defendant may plead that bail above was perfected in due time according to the conditions of the bond. Before the uniformity of process act, it was a good plea that the principal appeared, according to the condition of the bond or exigency of the writ, which was technically termed *comperuit ad diem*. But we have seen that the render of the principal, or his return into custody within the eight days, will not *now* discharge the bond, the condition of which is that bail should be put in above.^k It is a good plea that the bond was taken for ease and favor after the time limited for putting in special bail; and to this plea, if the action be at the suit of the sheriff, he should pray an enrolment of the bond, and after setting it out

*780

Comperuit ad diem.

Taken for case and favor.

^a See *ante*, 695. On the plea of *non est factum*, the bail may be admitted to prove circumstances rendering the bond illegal; as that it was executed after the return, or showing that the party bailed never was in the country or heard of the writ, and that the bail was imposed upon; but under this plea it cannot be objected that the sheriff returned *non est inventus* after taking but before assigning the bond. *Per Littledale, J.*, in *Taylor v. Clow*, 1 B. & Ad. 223. (20 Eng. C. L. 378.) The allegation of arrest is not traversable by the bail. *Id.*

^b 3 Ch. Pl. 866.

^c 2 Saund. 61. *Dawes v. Papworth*, *supra*. *Phillips v. Barlow*, 6 C. & P. 781. (95 Eng. C. L. 649.)

^d *Knowles v. Stevens*, 1 C. M. & R. 26. *nom.* *Snow v. Stevens*, 2 Dowl. 664.

^e *Id.* ^f *Hume v. Liversedge*, 1 C. & M. 332.

^g *Ball v. Swan*, 1 B. & A. 393. *Warmesley v. Macey*, 5 Moore, 168. (16 Eng. C. L. 392.) The mode of taking advantage of irregularities in practice is by application to the court, or by plea in abatement. *Id.*

^h *Carmichael v. Troubeck*, cited in *Sampson v. Brown*, 2 East, 442. 3 Ch. Pl. 869.

ⁱ *O'Kelly v. Sparkes*, 10 East, 377. ^j *Scholey v. Mearns*, 7 East, 148.

^k *Ante*, 773. See 3 Ch. Pl. 8.

state that he was sheriff, the defendant's arrest, that the bond was made to him as sheriff, and traverse the ease and favor.^a If the action be at the suit of the assignee, the replication should state that the bond was duly executed, and, denying the ease and favor, conclude to the country.^b

^a *Abney v. White*, Carth. 301. 2 Saund. 60.

^b *Lenthall v. Cooke*, 1 Lev. 254. 1 Saund. 163.

*CHAPTER IX.

DETINUE.

AN action of detinue lies for the recovery of a *specific chattel*, or the value of it, and also damages for the detention; it cannot be brought for the recovery of *real* property of any description; the thing for which it is brought must be clearly distinguishable from other property by certain discriminating marks, so that if the plaintiff recovers the sheriff may be able to deliver it to him. Thus it lies for a horse, a cow, a piece of gold, money in a bag, title deeds, or any chattel the identity of which can be ascertained; but it does not lie for money or corn not in a bag, or other things which cannot be distinguishably marked.^a

When detinue will lie.

In order to sustain this action, the plaintiff must have an absolute or special property in the chattel for which it is brought, and a right to the immediate possession at the time when the action is commenced. Therefore, where the plaintiff deposited with the defendant the title deeds of his estate, and afterwards conveyed the estate to his son, it was held that he could not maintain detinue for the deeds, for they went along with the estate, and he was not entitled to the possession of them.^b But it is not necessary that the chattel should have been previously in the actual possession of the plaintiff. Therefore, an heir may maintain detinue for an heirloom; and if goods be delivered to *A.* to deliver to *B.*, the latter may maintain this action, the property being vested in him by the delivery to his use.^c If a man detain the goods of a *feme covert* which came to his hands before her marriage, the husband alone must bring this action, because the property is in him alone at the time the action is commenced.^d If *A.*, without the authority of *B.*, pledges his property with *C.*, *B.* may maintain detinue against *A.* and *C.* jointly.^e

Who may sue in detinue.

*782

If a statute prohibits goods under pain of forfeiture, one part to the king and another to him who shall inform, seize, or sue for the same, any person may bring detinue for the goods, for bringing the action vests a property in him.^f

^a 3 Bl. Com. 151. Co. Lit. 286, b. Com. Dig. Detinue (B.)

^b Phillips v. Robinson, 4 Bing. 106. (13 Eng. C. L. 362.) See Land v. North, 4 Doug. 266. (26 Eng. C. L. 345.) Gordon v. Harper, 7 T. R. 9. Pain v. Whitaker, R. & M. 100. (21 Eng. C. L. 390.) See Atkinson v. Baker, 4 T. R. 229.

^c Com. Dig. Detinue A. 1 Bro. Ab. Detinue Pl. 30. See 2 Saund. 47, a. 1 Roll. Ab. 606.

^d B. N. P. 50. But it is otherwise in detinue for the charters of the wife's inheritance. 1 Roll. Ab. 606.

^e Garth v. Howard, 5 C. & P. 346. (24 Eng. C. L. 353.) Tindal.

^f B. N. P. 51. Roberts, q. t. v. Withered, 5 Mod. 193. Salk. 223. Gledstane v. Hewett, 1 C. & J. 545.

Who may be sued in detinue. The gist of this action is the wrongful detainer and not the original taking.^a It is said that it cannot be maintained where the defendant has taken the goods tortiously, as the property is thereby divested, and consequently not vested in the plaintiff at the commencement of the action.^b If goods be delivered to the husband and wife, the action must be brought against the husband only;^c but if delivered to the wife before her marriage, it should be brought against the husband and wife jointly for the detention before marriage.^d If *A.* delivers goods to *B.*, who loses them, and *C.* finds them and delivers them to *D.*, who has a right to them, *A.* cannot maintain detinue against *C.*, for *C.* is not privy to the delivery by *A.*^e This action cannot be supported against a person who never had possession of the chattels, and it is incumbent on the plaintiff to prove an actual possession of the goods by the defendant.^f Therefore, detinue will not lie against the executor of a bailee who has destroyed the chattel;^g and if there be several executors, and one only has the possession, the action must be brought against him alone.^h

*783 If upon demand upon the defendant for certain things, he says he has got them, and thereby induces the plaintiff to bring detinue against him, he is liable, although it does not appear that he had the general controlling power over the things.ⁱ

The declaration. More certainty is required in the description of the chattels in the declaration in this action than in trover.^j In detinue upon a bond, a variance as to the sum will be material.^k But the value of several parcels need not be laid separately, though the jury should assess the value of each thing, for the judgment is to recover the thing itself or the value of it; an omission to find the value cannot be supplied by a writ of inquiry.^l It is usual to state that the defendant acquired the goods by finding or on bailment; yet as the manner whereby he became possessed of them is a matter of inducement only, neither of these allegations is traversable; evidence of a wrongful detainer will be sufficient in either case.^m To a count in detinue on the bailment of a promissory note, to be re-delivered on request,

^a 3 Bl. Com. 152. Co. Lit. 286, b.

^b 3 Bl. Com. 152. Com. Dig. Detinue (D.) S. N. P. 657. But this doctrine is very questionable. See Com. Dig. Bien. (E.) Bro. Ab. Detinue, Pl. 19. Bishop v. Montague, Cro. Eliz. 824. And see 1 Ch. Pl. 123. Kettle v. Bromsall, Willes, 120.

^c B. N. P. 51.

^d Id. Co. Lit. 351.

^e B. N. P. 51. 2 Danv. 511.

^f Anderson v. Passman, 7 C. & P. 193. (32 Eng. C. L.)

^g B. N. P. 50. Bro. Ab. Detinue, 19. ^h Id.

ⁱ Hall v. White, 3 C. & P. 136. (14 Eng. C. L. 242.)

^j 2 Saund. 74, b.

^k 3 B. N. P. 51. 2 Roll. Ab. 703.

^l B. N. P. 51. Pawley v. Holly, 2 Bl. 853. Anderson v. Passman, 7 C. & P. 193. (32 Eng. C. L.) In detinue for several things, the court will not, on motion, assess the damages as to one article, and strike it out of the declaration on its being delivered up to the plaintiff. Phillips v. Hayward, 1 Harr. & Woll. 106. 3 Dowl. 362.

^m Mills v. Graham, 1 N. R. 140. Walker v. Jones, 2 C. & M. 672.

the defendant pleaded that the plaintiff had deposited the note with him to be kept as a pledge and security for the repayment of a loan of 50*l.*; held, on special demurrer, that the replication was good, and no departure.^a In case of a special bailment, the declaration should contain one count on the bailment, and allege a special request.^b Debt and detinue may be joined in the same action.^c

By Reg. G., H. T. 4 W. IV, "The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under such plea." Every other defence, therefore, must be specially pleaded. Pleadings.

The judgment in this action is that the plaintiff do recover the goods or the value thereof, if he cannot have the goods *themselves, together with damages for the detention, and full costs; the jury therefore should assess the value of each article separately, to enable the plaintiff to recover the value of such articles as cannot be returned.^d Judgment.

Until recently this form of action was very seldom resorted to, because the defendant might wage his law; but, since 3 & 4 W. IV, c. 42, s. 13, whereby wager of law is abolished, it has come into more frequent use. *784

^a Gladstone v. Hewitt, 1 C. & J. 545.

^b Kettle v. Bromsall, Willes, 120. Mills v. Graham, 1 N. R. 145.

^c 2 Saund. 117, b.

^d Chaney's case, 10 Co. 119, b. See Herbert v. Waters, Salk. 286.

*CHAPTER X.

DISTRESS.

	PAGE
I. Of the nature of distress and the causes for which it may be made.	
II. Who may distrain.	787
III. How a distress may be avoided.	792
IV. What things may, and what may not, be distrained.	794
V. In what place a distress should be made.	802
VI. In case of fraudulent removal.	803
VII. Of the time when a distress may be made.	805
VIII. How a distress should be made.	807
IX. How a distress should be disposed of.	809
X. Second distress.	813
XI. Rescous or pound breach.	814
XII. Remedy for a wrongful distress.	815

SECTION I.

OF THE NATURE OF A DISTRESS, AND THE CAUSES FOR WHICH IT MAY BE MADE.

DISTRESS is the taking of a personal chattel out of the possession of a wrong-doer into the hands of the party grieved, as a pledge for redressing an injury, the performance of a duty, or the satisfaction of a demand. By common right a distress may be made for the non-performance of services, as for neglecting to do suit to the lord's court, for heriot service, for amercements in a court leet, for cattle *damage-feasant*.^a So by common law, distresses were incident to every *rent-service*, and by particular reservation to *rent-charges*, but not to *rent-seck*, till the statute 4 Geo. II, c. 28, extended the same remedy to all rents alike, and thereby in effect abolished all material distinction between them, so that it may be laid down as a general principle that distress may be taken for any kind of rent in arrear.^b

*786 ^a A remedy by distress is also provided, by various statutes, for penalties and the non-performance of duties, &c., which the limited design of this work will not permit to be more particularly noticed.

^a 1 Rol. Ab. 665. 1 Inst. 96, a. 3 Bl. Com. 6.

^b A distress may be made for the whole rent reserved on furnished apartments, because in contemplation of law the rent issues out of the part of the demised premises which belongs to the realty. *Newman v. Anderton*, 2 N. R. 224. Although, generally, a distress cannot be made for a rent reserved on a letting of incorporeal hereditaments, as tithes, commons, or tolls. Co. Litt. 47, a.

It has been stated that a distress may be taken for any kind of rent in arrear; it may be remarked, however, that a distress cannot be made unless there be an actual demise at a fixed ascertained rent.⁽¹⁾ Therefore, where a tenant held premises under an agreement for a future lease, and no lease had been executed, or rent subsequently paid, it was held that the landlord could not distrain for rent, his remedy was by action for use and occupation. "There can be no distress," said Abbott, C. J., "unless there be a contract for an actual demise at a specific sum."^a So, where a lease of tithes and land was granted at an entire rent for both, and the lease as to the tithes was void, it not being under seal, it was held that a distress for the rent was unlawful, there being no distinct rent reserved on the land.^b

There must be a demise at a fixed rent to authorize a distress.

Any act, however, of the tenant which amounts to a recognition of a tenancy, and admits a liability to pay a certain rent, will enable the owner of the premises to distrain for rent in arrear, though there be no express demise. As where the tenant occupied premises under an agreement for a lease, which was not executed, and paid rent for two years; it was held that he was liable to be distrained for arrears of rent due for the third year, at the rate previously paid, the *quantum* of rent not being otherwise ascertained.^c So, where a tenant who had entered the premises under an agreement for a lease, admitted a charge for half a year's rent in an account between him and his landlord; it was held that this constituted him a tenant from year to year, and liable to be distrained.^d But where a tenant entered "under an agreement for a lease at a certain rent, the landlord undertaking to complete certain buildings, and after an occupation of several years, on being called on for the rent, he said he was ready to pay upon the buildings being completed; it was held, that as no rent had been paid, a demise at a certain rent could not be implied, so as to entitle the landlord to distrain."^e

A demise may be implied from payment of rent, so as to enable the landlord to distrain.

*787

^a *Dunk v. Hunter*, 5 B. & A. 322. (7 Eng. C. L. 115.) *Hagard v. Johnson*, 2 Taunt. 148. See *Neale v. Mackenzie*, 1 Gale, 119. 2 C. M. & R. 84.

^b *Gardiuer v. Williamson*, 2 B. & Ad. 336. (22 Eng. C. L. 91.)

^c *Knight v. Bennett*, 3 Bing. 361. (13 Eng. C. L. 8.) 11 Moore, 292.

^d *Cox v. Bent*, 5 Bing. 185. (15 Eng. C. L. 410.) 2 M. & P. 281.

^e *Regnard v. Porter*, 7 Bing. 451. (20 Eng. C. L. 194.) 5 M. & P. 370. Where

(1) (*Wells v. Hornish*, 3 Penn. 30. *Ege v. Ege*, 5 Watts, 134. On a demise of a grist mill, the lessee to render one third of the toll, the lessor may distrain for the rent. *Fry v. Jones*, 2 Rawle, 11. *Hoskins v. Rhodes*, 1 Gill & Johns. 266. "If one hires a man to work his farm, and gives him a share of the produce, he is a cropper. He has no interest in the land, but receives his share as the price of his labor. The possession is still in the owner of the land, who alone can maintain trespass; nor can he distrain, for he does not maintain the relation of landlord and tenant, which is inseparable from the right of distress." *Fry v. Jones*, *supra*. An agreement between A. and B., that the latter shall raise a single crop on shares upon the land of A., does not amount to a lease of the land. *Bishop v. Doty*, 1 Verm. 37. Rent payable in advance may be distrained for. *Beyer v. Fenstermacher*, 2 Wharton, 95. And see *Smith v. Shepard*, 15 Pick. 147. Interest on rent cannot be distrained for. *Dennison v. Lee*, 6 Gill & Johns. 383.)

SECTION II.

WHO MAY DISTRAIN.

Persons
having the
reversion
only, can
distrain.

A PERSON seised in fee or possessed of a term for years who has granted out or underleased the premises for a shorter period than his own interest, with a reservation of rent may distrain for rent in arrear without any express provision.^a But if a person transfers all his interest in the premises to another, so that he has not the reversion, although he reserves a rent he cannot distrain for it unless he reserves to himself a power of distraining, his only remedy in such case being by an action on the contract.^b(1) Therefore where *A.*, the lessee of two farms, agreed with *B.* that he should have them during the leases; *B.* to remain tenant to *A.* during that period, and at the leaving the farms, *B.* was to be paid for the fallows and dung; *B.* took possession and took one year's rent to *A.*, who afterwards distrained for rent in arrear; held, that he was not entitled so to do, as the agreement operated as an absolute assignment of all *A.*'s interest in the farms.^c So, where a lessee, whose term was to expire on the 11th of November, let the premises on the 11th of the preceding September to the plaintiff, who was to *788 hold them until the 11th of November, on paying down an immediate rent; it was held that the lessee could not distrain the goods, as the terms of the letting amounted to a lease, by which the whole of the lessee's interest had passed to the plaintiff.^d

Where *A.*, being seised in fee, demised premises to *B.* for a term of years, and during the continuance of the lease, he granted another lease to *C.*, to take effect from the expiration of the first; held, that *A.* did not thereby part with the reversion so as to disentitle him to distrain for rent due from *B.* under his lease.^e

A tenant from year to year underletting from year to year has a reversion which enables him to distrain.^f Where a person entered upon premises subject to the approbation of the

a landlord's receiver allowed the tenant to make a deduction in respect of a payment for land tax every year for seventeen years, greater than the landlord was liable to pay, the landlord knowing, or having the means of knowing, all the facts; held, that he could not distrain for the amount erroneously allowed, though the receipt given every year showed the amount paid and the amount deducted. *Bramston v. Robins*, 4 Bing. 11. (13 Eng. C. L. 323.)

^a Bac. Ab. 196. Litt. S. 214. *Wade v. Marsh*, Latch. 211.

^b *Smith v. Mapleback*, 1 T. R. 414. — *v. Cooper*, 2 Wils. 375. *Wade v. Marsh*, Latch. 211. *Preece v. Corrie*, 5 Bing. 24. (15 Eng. C. L. 353.) 2 M. & P. 57.

^c *Parmenter v. Webber*, 2 Moore, 656. 8 Taunt. 593. (4 Eng. C. L. 214.)

^d *Preece v. Corrie*, *supra*.

^e *Smith v. Day*, 2 Mees. & Wels. 684.

^f *Curtis v. Wheeler*, M. & M. 493. (22 Eng. C. L. 367.)

(1) (*Ege v. Ege*, 5 Watts, 134.)

landlord, and afterwards agreed to pay an advanced rent as well for the time he had been in possession as for the future; it was held that the landlord might distrain for the advanced rent accrued before the agreement, as well as for what accrued afterwards, such agreement giving him the same power by relation to his tenant's first entry into possession, as it did to recover his rent in future.^a

But if the landlord does any act which rebuts the presumption of an existing tenancy, as if he treats the occupier as a trespasser, by bringing ejectment against him, he cannot afterwards distrain him for rent;^b and if the tenant holds over after having received notice to quit from the landlord, he is not liable to a distress without some evidence of a renewal of the tenancy; for a mere holding over does not make him a tenant upon the old terms so as to confer on the landlord the right of distress; his remedy in such case is by an action for double value.^c But, if the tenant holds over after having given the landlord notice to quit, the latter may distrain for double rent during all the time that the tenant continues in possession.^d A weekly tenant, however, is not liable to be distrained for double rent, for holding over after notice; for he does not come within the statute.^e

*As tenants in common are obliged to avow separately, they should make several distresses.^f If a tenant to two tenants in common receive a notice from one not to pay the whole rent to the other, and afterwards do so, the one who gave the notice may distrain for his share.^g Where land was demised by four persons, (whose original title did not appear,) at one entire rent to be divided and paid separately in equal portions; and one of the four distrained upon the tenant for her own share of the rent; held, that the distress was regular, for whatever might have been the interest of the landlords as between themselves, as between them and the terre-tenant, they were tenants in common and entitled each to a separate distress.^h

One of several coheirs in gavelkind may distrain for rent due to all, without the authority of his coheirs.ⁱ Coparceners being considered but as one heir in law, must join in making a

^a *M'Leish v. Tate*, Cowp. 781.

^b *Bridges v. Smith*, 5 Bing. 410. (15 Eng. C. L. 491.) 3 M. & R. 740.

^c *Jenner v. Clegg*, 1 M. & Rob. 213. Confirmed by the Court of Exchequer. See *ante*, 729. But see *Zouch d. Ward v. Willingale*, 1 H. Bl. 311; where a distress under such circumstances was deemed merely a waiver of the notice.

^d By 11 G. II, c. 19, s. 18, this statute applies only to cases where the tenant has the power of determining the tenancy, and has given a valid notice. *Johnstone v. Hudleston*, 4 B. & C. 922, (10 Eng. C. L. 471,) *ante*, 732.

^e *Sullivan v. Bishop*, 3 C. & P. 359. (12 Eng. C. L. 170.)

^f *Pullen v. Palmer*, 3 Salk. 207. *Bradley on Dis.* 41.

^g *Harrison v. Barnby*, 5 T. R. 246. And see *Doe d. Pritchitt v. Mitchell*, 1 B. & B. 11. (5 Eng. C. L. 4.) *Powis v. Smith*, 5 B. & A. 850. (7 Eng. C. L. 279.)

^h *Whitley v. Roberts*, 1 M'Clel. & Y. 107.

ⁱ *Leigh v. Shepherd*, 2 B. & B. 465. (6 Eng. C. L. 203.)

*789
Tenants in
common.

Copar-
ceners.

- distress, but after partition they may make several distresses.^a
- Joint tenants.** One joint tenant may distrain alone, but then he must avow in his own right, and as bailiff to the other;^b and if not interdicted by the others, he may appoint a bailiff to distrain for rent due to all.^c As the tenant by the courtesy has an estate of freehold, he is, in contemplation of law, a reversioner, in all lands of the wife leased for years or life, and therefore may distrain of common right. If the wife's estate be but a rent of inheritance, he may also distrain for it.^d
- Tenant by the courtesy.** Tenants by *elegit*, *statute staple*, or *statute merchant* may distrain.^e A mortgagor may distrain under a lease by deed granted by himself after the mortgage, by virtue of the estoppel, but not for rent due under a lease granted previous to the mortgage, for the privity of estate is destroyed by the mortgage.^f A mortgagee may distrain after giving notice of the mortgage to the tenant in possession, under a lease prior to the mortgage.^g But it is doubtful whether he may distrain for rent due on a lease given after the mortgage without his privity.^h
- Tenants under execution. Mortgagor and mortgagee.** *790
- Annuitants.** An annuitant may distrain for arrears, though the term be vested in himself, to secure the payment.ⁱ
- Husbands.** Husbands seised in right of their wives might at common law distrain for rent due out of land, in which the wife had only a chattel interest, but he had no such right in respect of rent arising from a freehold interest in land, until the 32 Hen. VIII, c. 37, s. 3, enabled husbands seised in right of their wives, in fee, tail, or for life, of any rents or fee-farms, to distrain after the death of their wives for arrears during their lifetime. By section 4, tenants *pur autre vie* may distrain for arrears during the life and unpaid after the death of the *cestui que vie*, in like manner as at common law they might have done during his life.
- Tenants per autre vie.**
- Executors and administrators.** At common law executors or administrators could not distrain for arrears incurred in the lifetime of the owner of the rent, but by 32 Hen. VIII, c. 37, s. 1, "the personal representatives of tenants in fee, tail, or for life, of rent-services, rent-charges, rents-seck, and fee-farms may distrain for the arrear, upon the land charged with the payment, so long as the lands continue in the seisin or possession of the tenant in demesne, who ought to have paid the rent or fee farm, or of some person claiming under him by purchase, gift, or descent."
- This statute has been held to extend to the executors and

^a *Stedman v. Page*, 1 Salk. 390. Co. Litt. 164, b. *Butler & Baker's Case*, 3 Co. 22, b.

^b *Pullen v. Palmer*, *supra*. 5 Mod. 73.

^c *Robinson v. Hoffman*, 4 Bing. 562. (15 Eng. C. L. 73.) 1 M. & P. 474.

^d *Bradley on Dis.* 46.

^e *Bro. Ab. Distress*, Pl. 72. *Cubit's Case*, 4 Co. 7.

^f *Bradley on Dis.* 99.

^g *Moss v. Gallimore*, Doug. 379.

^h *Keech d. Warne v. Hall*, *id.* 21.

ⁱ *Fairfax v. Gray*, 2 Bl. 1326.

^j *Ognet's Case*, 4 Co. 61.

administrators of all tenants for life, in cases where even previously they had a remedy by action of debt as well as where they had no such remedy;^a though it was considered in one case not to extend to cases where the executors had a remedy at common law by action;^b and in a recent case it was held not to extend to the executors of a person who, being seised in fee, demised the premises for a term of years, reserving a rent, so as to enable the executors to distrain for arrears of rent accrued in the testator's lifetime.^c *791

But the 3 & 4 W. IV, c. 42, s. 37, enacts, "that it shall be lawful for the executors and administrators of any lessor or landlord to distrain upon the lands demised, for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as the lessor might have done in his lifetime;" and by sect. 38, "such arrearages may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined, provided that such distress be made within six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made as aforesaid."^d Executors may distrain for rent due in the lifetime of the testator, and within six months after the determination of a term.

A lord of a manor may of common right distrain for his copyhold rents.^e If by a custom the lord is precluded from turning cattle on the common during a certain season of the year, a commoner may distrain the lord's cattle which are turned on during that time.^f In case of an absolutely stinted common, in point of number, one commoner may distrain the supernumerary cattle of another; but not if an admeasurement is necessary, as where the stint has relation to the quantity of the commoner's land. Wherever there is a color of right for turning cattle on a common, a commoner cannot distrain, because it would be judging for himself in a case which depends on a more competent inquiry. But where cattle are turned on the Lords of manors and commoners. *792

^a *Hool v. Bell*, 1 Lord Raym. 173. *Lambert v. Austin*, Cro. Eliz. 332. See *Prescott v. Boucher*, 3 B. & Ad. 858. (23 Eng. C. L. 197.)

^b *Turner v. Lee*, Cro. Car. 471.

^c *Prescott v. Boucher*, 3 B. & Ad. 849. (23 Eng. C. L. 197.) *Jones v. Jones*, *id.* 967. (23 Eng. C. L. 202.) See *Renven v. Watkin*, S. N. P. 668. *Powell v. Killick*, *id.* *Meriton v. Gilbee*, 8 Taunt. 159. (4 Eng. C. L. 57.) *Martin v. Burton*, 1 B. & B. 279. (5 Eng. C. L. 82.) Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder, and after the expiration of it, a distress may be taken for rent due for the whole term. *Braithwaite v. Cooksey*, 1 H. Black. 465.

^d 3 & 4 W. IV, c. 42, s. 37, 38. Grant of rent to testator for years, with a clause of distress that the grantee and his heirs may distrain; held, that the executor should distrain, and not the heir. *Darrel v. Wilson*, Cro. Eliz. 644.

^e *Laugher v. Humphrey*, Cro. Eliz. 524.

^f 1 Roll. Ab. 505.

common without any pretence of right, the commoner may distrain them.^a

The general rule, however, that one commoner cannot distrain the cattle of another may be superseded by a special agreement; as where *A.*, being possessed of a quantity of land in a common field, and having a right of common over the whole field, and *B.* having also a right of common over the whole field, they entered into an agreement, for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each party covenanted to that effect; during the term the cattle of *B.* came upon the land of *A.*; it was held, that *A.* might distrain them damage feasant; for, by the operation of the agreement, *B.* stood in the situation of a stranger with regard to *A.*^b

SECTION III.

HOW A DISTRESS MAY BE AVOIDED.

Payment
or tender
of the rent
will pre-
vent a dis-
tress.

In general the landlord may distrain whenever the rent is in arrear, but a tender of the rent at a proper time and place, even though he refuse to take it, will supersede his power of distraining.^c A distress made after a tender of the arrears is illegal: and if a tender be made even after the landlord has distrained, but before the distress is impounded, a subsequent removal of the distress will subject the landlord to an action of trespass.^d But a tender *after* the distress is impounded is insufficient, because it is then in the custody of the law.^e Though the distress be made by a broker, a tender of the rent and costs to the landlord, or the party to whom the rent is due, will be sufficient.^f The landlord's privilege of distraining *may be waived by contract; as where the tenant with the privity of

^a *Hall v. Harding*, 1 Black. 673. 4 Burr. 2496.

^b *Whiteman v. King*, 2 H. Bl. 4.

^c *Anon.* 1 Vent. 21.

^d *Vertue v. Beasley*, 1 M. & Rob. 21.

^e *Firth v. Purvis*, 5 T. R. 532. Where cattle, distrained damage feasant, were in a private pound, and the distrainer admitted they were about to be forwarded to a public pound; held, that a tender of amends made, while they were in the private pound, was not too late. *Browne v. Powell*, 4 Bing. 230. (13 Eng. C. L. 410.) 12 Moore, 454.

^f *Smith v. Goodwin*, 4 B. & Ad. 413. (24 Eng. C. L. 89.) Or if the tender be made to the broker, it is good; and if he takes more than the sum he is entitled to, he is subject to a penalty of treble the amount unlawfully charged. 57 G. III, c. 39. It has been held that a tender of amends on a distress for damage feasant, cannot be made to the bailiff of the avowant. *Pilkington v. Hastings*, Cro. Eliz. 813. 5 Co. 76. But in a recent case, where the distrainer's wife had been in the usual habit of acting as his agent in such matters, and made a distress of cattle *damage feasant* in his absence, a tender of amends to her was held sufficient. *Browne v. Powell*, 4 Bing. 230. (13 Eng. C. L. 410.)

landlord sold by auction a right of eatage of pasture, which the plaintiff purchased, and the proceeds were paid to the landlord; held, Parke, B., *dissentiente*, that a contract by the landlord might be implied not to distrain cattle put on the land to consume the eatage, and that a distress of the plaintiff's cattle, for rent accrued previous to the sale, was unlawful.^a But where the plaintiff, being about to take an apartment of the defendant's tenant, was promised by the defendant that so long as he paid the rent to the tenant, his property should be safe; and having paid part, and tendered the residue, the defendant without notice of the tender, distrained his goods for rent due from the tenant; it was held, that his right to distrain was not barred by his promise.^b

As distress is the highest remedy known to the law, taking a bond or bill of exchange as a security for the rent, will not deprive the landlord of his right to distrain; for it cannot operate as an extinguishment of the rent until payment.^c Where the plaintiff gave a note of hand for rent in arrear, and took a receipt for it when paid, the defendant afterwards distrained for the rent; the plaintiff brought trespass; and it was holden, that notwithstanding this note, the defendant might distrain, for it is no alteration of the debt until payment.^d(1) And if a note be given under an agreement that it should operate as a suspension of the right of distress, in order to give it that effect, such agreement must be specially pleaded in bar to the avowry, as well as the fact that the note was given on account of the rent.^e

Taking a bond or bill of exchange will not deprive the landlord of his right to distrain.

^a *Horsford v. Webster*, 1 C. M. & R. 696. 1 Gale, 1.

^b *Welsh v. Rose*, 6 Bing. 638. (19 Eng. C. L. 185.)

^c *Roll. Ab. tit. Extinguishment. Drake v. Mitchell*, 3 East, 251. But a judgment obtained on a bond is an extinguishment of the rent. *B. N. P. 182.*

^d *B. N. P. 182. Davis v. Gyde*, 4 Nev. & M. 462. (29 Eng. C. L. 166.) 1 H. & W. 50.

^e *Davis v. Gyde*, *supra*.

(1) (A note or a judgment in covenant does not take away the right to distrain. *Snyder v. Kunkleman*, 3 Penn. 487.)

*SECTION IV.

WHAT MAY, AND WHAT MAY NOT BE DISTRAINED.

	PAGE		PAGE
1. Of goods and chattels which may be distrained in general.		leged	797
2. Things privileged from distress in favor of trade	795	4. Things in actual use	798
3. Things conditionally privi-		5. Goods in the custody of the law	799
		6. Fixtures	799
		7. Corn and growing crops	800

1.—*Of goods and chattels which may be distrained in general.*] DISTRESS being, at common law, considered merely as a pledge to compel the tenant to perform the duty required, nothing could be distrained by the lord, except such things as could be restored to the owner in the same plight and condition as they were in at the time when they were taken. In general, however, all moveable chattels and personal effects found on the premises, may be distrained for rent, whether they belong to the tenant or to a stranger;⁽¹⁾ and all chattels trespassing upon the land, may be distrained, *damage-feasant*.^a

Where a person, driving cattle to London, put them into a field to graze for a night, with the permission of the landlord and leave of the tenant, it was held, that the landlord might distrain them for rent due out of the premises on which they grazed.^b But it seems, that if under such circumstances there be an express agreement by the landlord not to distrain, or if such agreement can be inferred from his conduct, it will protect *the cattle from distress.*^c Cattle which are on the land by way of agistment, may be distrained for rent.^d It is settled law, that where a stranger's beasts come on the land of another through the negligence of the owner, they may be distrained immediately by the landlord, for rent in arrear; but where they come into the land through the defect of fences, which the tenant is bound to repair, they cannot be distrained until

^a 1 Inst. 47, a. Gilbert Dist. 34. 3 Bl. Com. 7. Per Lord Kenyon, C. J., in *Gorton v. Falkner*, 4 T. R. 567. But animals *feræ naturæ*, and other things wherein no person can have available property, are not distrainable. Co. Litt. 47. Finch, 176. Com. Dig. Distress, C. Deer, however, in an inclosed ground are distrainable. *Davies v. Powell*, Willes, 47.

^b *Fowkes v. Joyce*, 3 Lev. 260. 2 Vent. 131. 2 Saund. 290. But the owner of the cattle was afterwards relieved in equity on the ground of fraud in the landlord, *id.* And it seems to be settled law at this day, that cattle belonging to a drover being put into a close, with the consent of the occupier, to graze only one night, in their way to a fair or market, are not liable to be distrained for rent. *Tate v. Gleed*, 2 Saund. 290, 5th ed. See *Peacock v. Purvis*, *post*, 799.

^c *Horsford v. Webster*, *ante*, 793.

^d Co. Litt. 161.

(1) (*Kessler v. McConachy*, 1 Rawle, 435. The tenant is liable over to a stranger whose goods are distrained. *Ibid.*)

they have been *levant et couchant*; that is, until they have been lying down and rising up on the premises for a night and a day; for then the law assumes, that the owner of the cattle had notice that they are in the land, and that it is his own negligence not to take them away.^a

Though in general all moveable chattels found on the premises out of which the rent issues, are distrainable for rent in arrear, yet, to this rule there are many exceptions, which we shall proceed to notice.

2.—*Things privileged in favor of trade.*] Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed, in the way of his trade or employ, such as cloth sent to a tailor's shop, to make a garment; yarn sent to a weaver's to be woven; a horse standing in a smith's shop to be shod, and the like, are, by the common law, privileged from distress for rent, for the sake of trade and commerce, which could not be carried on, if such things under these circumstances could be distrained for rent due from the person in whose custody they are.^b On the same principle, the goods of the principal in the hands of a factor for sale, cannot be distrained by the factor's landlord; for the advancement of trade equally requires that such goods should be placed in a factor's hands for sale, as in a carrier's for carriage.^c So goods deposited in a warehouse or wharf, for safe custody *until an opportunity for selling them should arise, cannot be distrained for rent due in respect thereof.^d So where a beast was sent by one butcher to another butcher's shop to be slaughtered; it was held, that the landlord of the premises could not distrain the carcase for rent.^e So where goods were deposited on the premises of an auctioneer for sale, they were held, to be protected from distress; for, said Bayley, B., "*interest reipublicæ*, to bring buyers and sellers together, at fixed places, where goods may be brought for the purposes of sale and exchange. This species of privilege has been from time to time increased in extent, according to the new modes of dealing established between the parties by the change of times and circumstances, one of which modern modes of dealing is the case of a factor."^f On the same principle, chattels are privileged from distress at an inn;^g but, to exempt them from distress, they must be actually within the premises of the inn itself; for where a race-horse was placed at a stable half a mile from the inn, it was

Things
privileged
from dis-
tress.

*796

^a 2 Saund. 290. Gilbert Dist. 45. 2 Bl. Com. 8.

^b Per Willes, C. J., in *Simpson v. Hartopp*, Willes, 515, which is usually cited as a leading case on this subject. *Giebourne v. Hurst*, Salk. 249. 1 Inst. 47, a. Wood v. Clarke, 1 C. & J. 484, post, 798.

^c *Gilman v. Elton*, 3 B. & B. 75. (7 Eng. C. L. 355.) 6 Moore, 243.

^d *Thompson v. Mashiter*, 1 Bing. 283. (8 Eng. C. L. 324.) 8 Moore, 254. *Mathias v. Mesnard*, 2 C. & P. 353. (12 Eng. C. L. 166.)

^e *Brown v. Shevill*, 2 Ad. & Ell. 138. (29 Eng. C. L. 51.) 4 Nev. & M. 277.

^f *Adams v. Grane*, 1 C. & M. 380. ^g 3 Bl. Com. 7.

held not to be privileged; and that the landlord of the premises was justified in distraining it.^a And it seems that a carriage standing at livery, is not exempted from distress.^b (1)

A conveyance sent for goods is not privileged if the goods themselves be distrainable.

Where the boat of the plaintiff, who was an alkali manufacturer, was lying in a canal communicating with a public navigation, for the purpose of being loaded with salt from a salt manufactory, which was contiguous, the court of Exchequer held, (Parke, B., *dissentiente*,) that the boat was not privileged from distress for arrears of an annuity issuing out of the land in which the salt works were erected, and granted by the manufacturer of the salt; for the salt itself, which was to be sent by the boat, was not privileged, and there was no case which extended the privilege to a conveyance sent for goods, which were not themselves privileged from distress; besides, it was not necessary for the protection of that trade that the privilege should exist, for the salt works might be carried on without the possession of the boat being parted with by the plaintiff, and if he retained the possession of the boat, it was clearly privileged.^c

*797

Things privileged if there be other sufficient distress.

3.—*Things conditionally privileged.*] Beasts of the plough, sheep, implements of husbandry, the tools and utensils of a man's trade, and the instruments of a man's profession, are not distrainable, provided there be other sufficient distress on the premises.^d But if there be no other sufficient subject of distress than growing crops, which are not immediately productive, it seems that the landlord may distrain beasts of the plough, or other things privileged *sub modo*, for he has a right to apply those things which are immediately productive in satisfaction of the rent;^e and if the landlord used due diligence, by appraisalment by proper persons, to ascertain whether there be a sufficient distress, without resorting to things conditionally privileged, he will not be liable to an action for illegal distress, for distraining beasts of the plough or other things so privileged, though it appear after the sale that there would have been sufficient distress without taking such things; for he is not to be affected by a subsequent sale, at higher prices than

^a Crosier v. Tomkinson, 2 Lord Kenyon, 439.

^b Francis v. Wyatt, 1 Bl. 483. 3 Burr. 1498.

^c Muspratt v. Gregory, 1 Mees & Wels. 633. 2 Gale.

^d 51 Hen. III, st. 4. 1 Inst. 47, a. 161, a. Simpson v. Hartopp, Willes, 512. Gilbert on Dis. 36. Gorton v. Falkner, 4 T. R. 565.

^e Pigott v. Birtles, 1 Mees. & Wels. 441. 2 Gale, 18.

(1) (*Francis v. Wyatt* [cited in support of the position in the text] would now hardly be acknowledged as authority in Westminster Hall, the decisions since the American Revolution being inconsistent with it. Per Gibson, C. J., in *Brown v. Sims*, 16 S. & R. 138. The goods of a third person placed in the way of trade on storage in the warehouse of one, who used the trade and business of a merchant, and received goods and merchandise from merchants and traders on storage are not liable to distress for rent though found on the premises. *Ibid.*)

was expected; nor under such circumstances need he postpone the sale of beasts of the plough to that of other things.^a

Where the plaintiff, a manufacturer, furnished a weaver not only with materials which he was to work, but also with frames and other implements, for the purpose of being used in the weaver's house in working materials; it was held, that though the materials so delivered by the manufacturer, were privileged from distress for rent due to the weaver's landlord, yet that "the machinery was not privileged, unless there were other goods on the premises sufficient to satisfy the rent due. "This case," said Lord Lyndhurst, C. B., in delivering the judgment of the court, "does not turn on the privilege of a workman, with respect to the implements and machinery by which his trade is to be carried on, but upon the privilege of the person by whom the workman is employed. It appears to us, that the employer's privilege is confined to the materials which he supplies, and does not include the machinery. None of the cases go beyond this, that the material to be worked up is privileged; that the conveyance by which it is carried to and from the place of manufacture is privileged; that it is privileged in the hands of the carrier while he is carrying it, in the hands of the factor to whom it is consigned, and in the hands and warehouse of a wharfinger, where it is lodged and deposited by the factor. There is no case or *dictum* that the machinery by which it is to be manufactured is included in the privilege."^b So it has been held, that a threshing-machine, which was lent to the tenant, and which was lying on his premises, not in actual use, was distrainable, there not being other sufficient distress on the premises.^c

Machinery when not privileged.

*798

4.—*Things in actual use.*] Things in actual use, as a horse upon which a man is riding, or an axe in the hands of a man who is cutting wood, and the like, are privileged from distress; in order to prevent a breach of the peace, which might be occasioned by an attempt to distrain them.^d In trover for a stocking-loom, which had been distrained for rent, where it appeared that an apprentice was using the loom at the time it was taken, the court held that it could not legally be taken while the apprentice was using it.^e But though wearing apparel, if in actual use, cannot be distrained, yet if it be not in use, it may be distrained, even though it be only taken off *for

*799

^a Jenner v. Yolland, 6 Price, 5. 2 Chitty, 167. (18 Eng. C. L. 286.) Beasts of the plough are, however, distrainable for poor rates, though there be other sufficient distress on the premises; by reason of the analogy between such distress and an execution. Hutchins v. Chambers, 1 Burr. 579.

^b Wood v. Clarke, 1 C. & J. 484. 1 Tyr. 314. See Simpson v. Hartopp, Willes, 54.

^c Fenton v. Logan, 9 Bing. 676. (23 Eng. C. L. 416.) 3 M. & Scott, 82.

^d 1 Inst. 47, a. Simpson v. Hartopp, Willes, 54. Stony v. Robinson, 6 T. R. 131.

^e Watts v. Davis, S. N. P. 666.

natural repose;^a and it has been held, that a horse which a man was leading only, might be distrained.^b

Things in the custody of the law cannot be distrained.

5.—*Goods in the custody of the law.*] Goods in the custody of the law, as things distrained *damage feasant*, or taken in execution, or under an attachment, cannot be distrained for rent in arrear.^c Where corn, while growing was seized under a *fi. fa.*, and after it was cut, but before it was fit to be taken away the landlord distrained it for the rent; it was held, that the distress was illegal as the corn was not left an unreasonable time on the premises.^d It has been held, however, that if goods remain on demised premises after a fictitious bill of sale made of them under an execution, they are liable to be distrained as before.^e And where a sheriff's officer executed a writ of *fi. fa.* by going to the house and informing the debtor he came to levy on his goods, and laying his hand on a table and saying "I take this table," and then locked up his warrant in the table drawer, took the key, and went away without leaving any person in possession, and after the *fi. fa.* was returnable, but not continued, the landlord distrained the goods for rent; held, that the sheriff could not maintain trespass against him; for, by quitting the premises after the seizure, and leaving no person in the possession of the goods, he relinquished the possession, and the goods were no longer in the custody of the law.^f

*800 6.—*Fixtures.*] Things annexed to the freehold, as furnaces, mill-stones, or chimney pieces cannot be distrained, because they cannot be taken away without doing injury to the freehold, which the law will not allow;^g and this privilege extends to things which the tenant will not be allowed to remove from the premises by reason of their being considered as annexed to the freehold, though they be not affixed to it; for even if a mill-stone be taken out of its proper place to be picked, it cannot be distrained; because such removal is of necessity, and it is still part of the mill; nor can a smith's anvil on which he works, be distrained, though it be not fastened by nails, for it is accounted part of the forge.^h A kiln cannot be distrained;ⁱ and it is questionable whether machinery fixed by bolts to the floor of a factory can be distrained for rent.^j

^a Bissett v. Caldwell, Peake, 36. Baynes v. Smith, 1 Esp. 206.

^b Wagstaff v. Clark, Woodfall, L. & T. by Harr. 313.

^c 1 Inst. 47, a. Eaton v. Southby, Willes, 131. Parslow v. Cripps, Comyn. 213. Peacock v. Purvis, 5 Moore, 79. 2 B. & B. 362. (6 Eng. C. L. 154.)

^d Wright v. Dewes, 1 Ad. & Ell. 641. (28 Eng. C. L. 172.) Peacock v. Purvis, *supra*.

^e Smith v. Russell, 3 Tannt. 400.

^f Blades v. Arundle, 1 M. & S. 711.

^g Co. Litt. 47, b. Per Willes, C. J., in Simpson v. Hartopp, *supra*. Wynne v. Ingleby, 1 D. & R. 247. 5 B. & A. 625. (7 Eng. C. L. 214.)

^h Bro. Ab. tit. Dist. pl. 23.

ⁱ Niblet v. Smith, 4 T. R. 594.

^j Duck v. Braddyll, M'Clel. 217. 13 Price, 459.

7.—*Corn and growing crops.*] A distress being considered at common law merely as a pledge, things were held not to be distrainable which could not be restored in the same plight as they were when taken, therefore cocks and sheaves of corn were not distrainable. But by 2 W. & M. c. 5, s. 3, "sheaves or cocks of corn, or loose corn and hay lying upon any part of the land charged with the rent, may be seized, secured, and locked up in the place where found, in the nature of a distress, until replevied or sold; but the same must not be removed to the damage of the owner from such place."^a And as growing corn was considered part of the freehold, it could not be distrained at common law, but by 11 Geo. II, c. 19, s. 8, the landlord may distrain for arrears of rent, all sorts of corn and grass hops, roots, fruits, pulse, or other product whatsoever, growing upon any part of the estate demised, and may cut, carry, and lay up the same when ripe, in barns on the premises, or if there be no barn or proper place on the premises, then in any other place as near as may be; and in a convenient time appraise and dispose of the same towards satisfaction of the rent and expenses; the appraisement to be made when cut and gathered, and not before. Sec. 9 provides that if the tenant shall pay or tender the arrears of rent and costs before the corn is cut, the distress shall cease, &c. The words *other product* "in the above enactment have been held to apply only to other product of a nature similar to the things specified, that is to say, product to which the process of ripening and being cut, gathered, made and laid up when ripe, is incidental; therefore trees and shrubs growing in a nursery ground are not distrainable within the statute."^b Growing crops may be considered in the nature of goods and chattels, as they may be distrained in the same manner as articles of the latter description.^c But where *A.* granted an annuity to *B.*, charged on certain premises and empowered him to distrain for the arrears, and "to detain, manage, sell and dispose of the distresses in the same manner in all respects as distresses for rents reserved upon leases for years, and as if the said annuity was a rent reserved upon a lease for years;" the court thought that these words did not empower the grantee to distrain growing crops, but only conferred on him the powers given by 2 W. & M. c. 5, s. 3.^d Growing crops cannot be sold before they are ripe.^e Where, however, a landlord distrained and sold growing crops before

Sheaves of corn, cocks of hay, and growing crops may be distrained.

*801

^a Sec. 2, *post*, 810, requires the goods distrained to be sold at the expiration of five days, if not replevied. "It seems that under this statute the landlord has no option, but must sell at the end of five days." Per Parke, B., in *Pigott v. Birtles*, 1 M. & Wels. 448.

^b *Clark v. Gaskarth*, 8 Taunton, 431. (4 Eng. C. L. 154.) 2 Moore, 491, recognised in *Clarke v. Calvert*, 3 Moore, 114. (4 Eng. C. L. 272.)

^c *Glover v. Coles*, 1 Bing. 6. (8 Eng. C. L. 221.) 7 Moore, 231.

^d *Miller v. Green*, in Error, 2 C. & J. 143. 2 Tyr. 1. 8 Bing. 92. (21 Eng. C. L. 234.) 1 M. & Scott, 199.

^e *Owen v. Leigh*, 3 B. & A. 470. (5 Eng. C. L. 346.)

they were cut, and it appeared that they had fetched as much as if sold at the proper time, and the arrears of rent exceeded what they sold for; it was held in trover by the tenant that he was entitled to nominal damages only.^a

Where a sheriff took corn in the blade under a *fi. fa.*, and sold it before the rent was due, it was held that he was not liable to account to the landlord of the defendant, under the statute 8 Anne, for rent accruing subsequently to the levy and sale, although he had given notice, and though the corn was not removed from the premises until long afterwards.^b

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*By 56 Geo. III, c. 50, s. 6, landlords are not to distrain for rent on purchasers of crops severed from the soil, or other things sold subject to husbandry agreements, nor on stock or implements employed, under the provisions of the act.

*SECTION V.

IN WHAT PLACE A DISTRESS SHOULD BE MADE.

A distress must be made on the premises from which the rent issues, unless when removed to prevent a distress. THE distress must in general be made on the premises out of which the rent issues; therefore, where there was a demise of a wharf, together with all ways, paths, passages, easements and appurtenances whatsoever to the said wharf belonging; it was held that the landlord could not distrain barges lying opposite to the wharf between high and low water mark, and attached by ropes to the wharf although the verdict of a jury found that the exclusive use of the land between high and low water mark, as well when covered with water as when dry, was demised as appurtenant to the wharf, for the accommodation of the tenants of the wharf; but they also found that the land itself between high and low water mark was not demised. "If," said Lord Tenterden, C. J., "the meaning of the finding of the jury be that the use and enjoyment of the land between high and low water mark passed as appurtenant, that would be a mere privilege or easement, and the rent could not issue out of that; the landlord, therefore, could not distrain there for rent issuing out of land in respect of which the easement or privilege had its existence." If, however, the landlord enters

^a Proudlove v. Twemlow, 1 C. & M. 326. A custom that a tenant may leave his away-going crop in the barns, &c., of the farm, for a certain time after the lease is expired, and he has quitted the premises, is good; and the landlord may distrain the corn so left, for rent in arrear, after six months have expired from the determination of the term. Beavan v. Delahay, 1 H. Black. 5. S. P. Lewis v. Harris, 1 H. Black. 7, n.

^b Gwillim v. Barker, 1 Price, 274.

* Buszard v. Capel, 8 B. & C. 141. (15 Eng. C. L. 169.) 2 M. & R. 197, in Error. 6 Bing. 150. (19 Eng. C. L. 36.) 3 M. & P. 480, overruling S. C. 4 Bing. 137. (13 Eng. C. L. 377.) 12 Moore, 339.

on the premises to distrain, and he has a view of cattle or other chattels thereon, and the tenant removes them to prevent a distress, the landlord may follow them and distrain them out of the premises; but if the beasts go off the land of themselves before they are seen by the landlord, he cannot distrain them afterwards;^a and it is said that if the owner drive beasts *damage feasant* out of the soil, even with a view to evade a distress, they cannot be distrained, *because the beasts must be *damage feasant* at the time of the distress.^b *803

* Where there are separate demises, there ought to be separate distresses on the several premises subject to distinct rents.^c Where, however, lands lying in different counties are held under one demise at one entire rent, a distress may be taken in either county for the whole rent in arrear, and chasing a distress over is a continuance of the taking; but where the counties do not adjoin, a distress cannot be chased from one county into the other.^d If a rent-charge issue out of land in the possession of many tenants, a distress may be taken upon the possession of one for the whole rent, for it issues out of each part.^e Lands in different counties.

SECTION VI.

IN CASE OF FRAUDULENT REMOVAL.

By stat. 11 Geo. II, c. 19, s. 1, "if lessee for life, term of years, at will, or otherwise, of lands or tenements, upon the demise whereof any rents are reserved, shall fraudulently or clandestinely carry off his goods from such demised premises, to prevent a distress, the lessor, or any person empowered by him, may, within thirty days after carrying off, distrain such goods, wherever found, for the rent arrear, and sell or dispose of the same, as if distrained on the premises."^f If after the rent becomes due, goods be fraudulently removed to prevent a distress, the landlord may distrain them wherever he can find them.

By sec. 2, "no landlord or other person, &c., shall seize such goods or chattels which shall be sold, *bond fide* and for a valuable consideration, before such seizure made, to any person not privy to such fraud." By sec. 8, "the landlord may distrain any cattle or stock of the tenant depasturing on any com-

^a Co. Litt. 161, a. Per Tindal, C. J., in *Rand v. Vaughan*, *post*, 804, n.

^b *Id.* But it was decided by Lord Eldon, in *Clement v. Milner*, 3 Esp. 95, that to justify a distress *damage feasant*, it was sufficient that the distrainer entered the *locus in quo* whilst the cattle were in it.

^c *Rogers v. Birkmaire*, 2 Stra: 1040.

^d *Walter v. Rumball*, 1 Lord Raym. 55. 12 Mod. 76.

^e 1 Rol. Ab. 671.

^f This provision is similar to that of 8 Ann, c. 14, s. 2, which authorised landlords to follow and distrain cattle within *five* days after the removal.

mon, appendant or appurtenant, or any way belonging to the premises demised."

- *804 "In order to justify a landlord in acting under the first section of this statute, the goods must have been removed *after* the rent became due, for if they be removed at *any time before* the rent becomes due, the landlord will not be warranted in distraining them off the premises.^a The statute, however, applies to all cases where a landlord is, by the conduct of his tenant in removing goods from premises for which rent is due, turned over to the barren right of bringing an action for his rent. Where a tenant openly, and in the face of day, and with notice to his landlord, removed his goods without leaving sufficient on premises to satisfy the rent then due, and the landlord followed and distrained the goods; held, that although the removal might not be clandestine, yet, if it was fraudulent, (which was a question for the jury,) the landlord was justified under the statute.^b

The removal must be fraudulent

The mere removal of the goods is not sufficient to bring the case within the statute. The removal must be *fraudulent*, which is a question for the jury;^c and it must appear that sufficient goods were not left on the premises to meet the arrears of rent.^d (1) The statute applies to the goods of the tenant only, and not to those of a stranger or a lodger; wherefore, a plea justifying the following goods off the premises, and distraining them for rent arrear, must show that they were the tenant's goods.^e

Where the assignees of a bankrupt, who was lessee of pasture land, being chosen on the 8th of the month, allowed his cows to remain upon the demised premises till the 10th, and ordered them to be milked there; held, that they thereby became tenants to the lessor, and the cows being removed on the

*805 *10th to avoid a distress for arrears of rent, that he had a right to follow and distrain them.^f

^a *Watson v. Main*, 3 Esp. 16. *Furneaux v. Fotherby*, 4 Camp. 136, where Lord Ellenborough, however, expressed some doubts whether, if the goods were removed the night before the rent became due, the landlord might not follow them. The above doctrine, however, was recognised and acted on in *Rand v. Vaughan*, 1 Bing. N. C. 767. (27 Eng. C. L. 568.) 1 *Hodges*, 173. *Watts v. Thomas*, MS. Q. B. M. T. 1837.

^b *Opperman v. Smith*, 4 D. & R. 33. (16 Eng. C. L. 187.)

^c *John v. Jenkins*, 1 C. & M. 227.

^d *Parry v. Duncan*, 7 Bing. 243. (20 Eng. C. L. 118.) 5 M. & P. 19.

^e *Thornton v. Adams*, 5 M. & S. 38. *Postman v. Harrell*, 6 C. & P. 225. (25 Eng. C. L. 369.)

^f *Welch v. Myers*, 4 Camp. 368.

(1) (*Purfell v. Sands*, 1 Ashmead, 120.)

SECTION VII.

AT WHAT TIME A DISTRESS MAY BE TAKEN.

A DISTRESS for rent cannot be made at night, that is, between sunset and sunrise,^a nor can it at common law be made until the day after the rent becomes due, for the rent is not due until the last minute of the natural day on which it is reserved, though strictly it is demandable and payable before sunset on that day.^b The custom of a place, however, or an agreement between the landlord and tenant, may empower the landlord to distrain for it earlier. Therefore, where a trader, after committing an act of bankruptcy, took a shop, and agreed to pay a half-year's rent in advance, where by the custom of the country, half a year's rent became due on the day on which the tenant entered; it was held, that the landlord, after an assignment under the commission, and before the year expired, might distrain the goods on the premises for half a year's rent.^c

At common law the landlord could not have distrained for his rent after the expiration of the term.^d But by 8 Anne, c. 14, s. 6, "any person, having any rent in arrear upon any lease for life or lives, or for years or at will, may distrain for such arrears after the determination of the lease; provided such distress be made within six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."^e

Although this proviso is in terms confined to the possession of the tenant, yet it has been held, that where the tenant dies before the term expires, and his personal representative continues in possession during the remainder and after the expiration of the term, the landlord may distrain within six calendar months after the end of the term, for rent due at the time when the tenant died, as well as for what accrued afterwards.^f

Where a landlord permitted his tenant to retain possession of part of a farm after the tenancy had expired, it was held, that he might distrain on that part within six months after the expiration of the tenancy.^g So, where part of a tenant's corn remained in a barn on the demised premises beyond six calen-

^a 1 Inst. 147, a. Gilbert on Dis. 56. Aldenburgh v. Peaple, 6 C. & P. 212. (25 Eng. C. L. 361.) But cattle *damage feasant* may be distrained at night; for otherwise they might escape.

^b Duppa v. Mayo, 1 Saund. 287.

^c Buckley v. Taylor, 2 T. R. 600.

^d 1 Inst. 47, b.

^e It has been held that this statute does not apply to cases where the tenancy is put an end to by the tenant's wrongful disclaimer. Doe d. David v. Williams, 7 C. & P. 322. (39 Eng. C. L.)

^f Braithwaite v. Cooksey, 1 H. Bl. 485.

^g Nuttall v. Staunton, 4 B. & C. 57. (10 Eng. C. L. 276.) 6 D. & R. 155.

dar months, but within the time allowed by the custom of the county for outgoing tenants to get in and dispose of their crops; it was held, that the landlord might distress the corn on the premises.^a So, where the tenant's remaining was by agreement.^b But a termor, who lets to an under-tenant, cannot, after his term has expired, enforce the continuance of the under-tenancy by distress, if the under-tenant refuses to acknowledge him as landlord, or pays him under threat of distress; although the under-tenant still retain the possession.^c

Limitations as to the time of making a distress.

By 3 & 4 W. IV, c. 27, s. 2, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or bring such action, shall have first accrued; and by sec. 42, no arrears of rent or interest in respect of money charged upon or payable out of any land or rent shall be recovered by distress or action, but within six years next after the same shall have become due, or after an acknowledgment of the same in writing shall have been given to the person entitled thereto, signed by the person by whom the same was payable.^d

*807

*SECTION VIII.

HOW A DISTRESS SHOULD BE MADE.

Authority of a bailiff to distress.

THE distress for rent should be made by the landlord or his bailiff; if by the latter he should have a warrant of distress signed by the landlord; (1) a subsequent assent, however, will be as effectual as a previous command; for "whenever a specific appointment of an agent is necessary, a subsequent recognition of acts done by him in that capacity is better even than a previous authority."^e Where, in replevin against a broker, it appeared that the landlord had employed the attorney the defend him, it was held sufficient evidence of the broker's authority to distress, in the absence of any written warrant.^f

The stat. 13 Edw. I, c. 37, (West. 2,) which enacts that no

^a *Lewis v. Harris*, 1 Hen. Bl. 7, n. *Bevan v. Delahay*, *id.* 5.

^b *Knight v. Bennett*, 3 Bing. 361. (13 Eng. C. L. 8.) 11 Moore, 222.

^c *Burn v. Richardson*, 4 Taunt. 720. ^d 3 & 4 W. IV, c. 27, s. 2 & 42.

^e Per Best, C. J., in *Jones v. Bright*, 5 Bing. 533. (15 Eng. C. L. 529.) 2 M. & P. 120. Bro. Ab. tit. *Traverse*, 3. *Lamb v. Mills*, 4 Mod. 378. 11 Mod. 112.

^f *Duncan v. Meikleham*, 3 C. & P. 172. (14 Eng. C. L. 257.) It seems that an infant cannot be a bailiff. *Cuckson v. Winter*, 2 M. & R. 313.

(1) (Bailiff to distress may be constituted by parol. *Franciscus v. Reigart*, 4 Watts, 98. Need not be a constable. *Wells v. Hornish*, 3 Penn. 30.)

distress shall be taken except by bailiffs "sworn and known," does not apply to distresses taken for rent in arrear.^a

If the landlord enter a house and seize upon some goods as a distress in the name of all the goods in the house, it will be sufficient.^b Even a slight expression of the landlord's intention to make a distress will be sufficient. As where a landlord, hearing a tenant and a stranger dispute about the property of an article in the premises, declared that the article should not be removed until his rent was paid, and in the afternoon of the same day sent his broker to distrain for the rent; it was held, that the distress was commenced by the declaration of the landlord in the morning, and completed by the entry of the broker, and that the landlord was entitled to an article which had been removed in the mean time.^c

What is a sufficient seizure.

Where a landlord's agent went on the tenant's premises, walked round them, and gave a written notice that he had distrained certain goods lying there, for rent, and that unless the rent was paid within five days the goods would be sold, and went away without leaving any person in possession; it was held to be a sufficient seizure to give the tenant a right of action for excessive distress, and that quitting the premises without leaving any one in possession was not an abandonment of the distress, as the 11 G. II, c. 19. s. 10, gave the landlord power to impound, or otherwise secure on the premises goods distrained for rent in arrear.^d

*808

A broker's man having taken possession of property under a distress for rent, after remaining two days, left the house in a state of great excitement, bordering on insanity. The landlord thinking that his leaving had been procured by the drugging of his liquor by the parties in the house, but which was not proved, six days after broke into the house and took away the goods, without any previous demand of admission; held, that he had no right to enter again after so long a delay, and that the owner of the goods might maintain trover for them.^e

In order to make a distress, the outer door cannot in ordinary cases be broken; but if the outer door be open, the person distraining may justify breaking open an inner door, or lock, to find any goods that may be distrainable.^f It has been held that trespass will not lie against a landlord who occupied

The outer door must not be broken, but an inner door may.

^a *Begbie v. Hayne*, 2 Scott, 193. 2 Bing. N. C. 124. (29 Eng. C. L. 278.) 1 Hodges, 266.

^b *Dodd v. Morgan*, 6 Mod. 215.

^c *Wood v. Nunn*, 5 Bing. 10. (15 Eng. C. L. 346.) 2 M. & P. 27.

^d *Swann v. Falmouth*, (Earl of,) 8 B. & C. 456. (15 Eng. C. L. 264.) 2 M. & R. 534.

^e *Russel v. Rider*, 6 C. & P. 416. (35 Eng. C. L. 463.)

^f *Browning v. Dann*, B. N. P. 81. In making a distress for rent, circumstances may occur which may require the presence of a police officer. But to justify the landlord in calling him in, it must be shown that his presence was rendered necessary either from threats of resistance, or the apprehension of violence, &c. *Skidmore v. Booth*, 6 C. & P. 777. (25 Eng. C. L. 646.) *Tindal*.

an apartment over a mill demised to his tenant, from which it was divided only by a boarded floor without any ceiling, for taking up the floor of his own apartment, and entering through the aperture to distrain for rent.^a And by 11 Geo. II, c. 19, s. 7, "any place in which goods or chattels, fraudulently or clandestinely conveyed away, are locked up or secured, so as to prevent the same from being taken as a distress for rent arrear, may be broken open and entered in the day time by the party distraining; first calling to his assistance the constable or other peace officer of the place where the goods are suspected to be concealed; and in case of a dwelling-house, oath being first *made before a justice of the peace of a reasonable ground to suspect that such goods are therein; and the same may be taken and seized for the arrears of rent, as if they had been in an open place."

When the
outer door
may be
broken
open.

*809

SECTION IX.

HOW A DISTRESS SHOULD BE DISPOSED OF.

1. Impounding a distress.

2. Sale of a distress.

PAGE
810

Where a
distress
should be
impound-
ed.

Costs of
impound-
ing.

1.—*Impounding a distress.*] At common law the party distraining goods might impound them in any place that he thought proper.^b But by 1 & 2 Philip & Mary, c. 12, s. 1, no distress of cattle is to be driven out of the hundred, rape, wapentake, or lathe where the same is taken, except it be to a pound overt, within the same shire, nor above three miles from the place where the same is taken; nor impounded in several places, whereby the owner may be constrained to sue several replevins, on pain of forfeiting to the party grieved one hundred shillings, and treble damages; and by sec. 2, no person shall take for keeping in pound or impounding any distress above four pence for any one whole distress; on pain of forfeiting five pounds to the party grieved. It has been held, under this statute, that where lands lying in two adjacent counties were let under one demise, at one entire rent, and the landlord distrained cattle in both counties for rent, he might chase them all into one county; but not so if the counties were not adjoining.^c The offence under this statute for impounding a distress in a wrong place, or in several places, is but a single offence, though several persons be concerned, and shall be satisfied with one forfeiture.^d By 11 Geo. II, c. 19, s. 10, persons distraining for rent may

^a Gould v. Bradstock, 4 Taunt. 562.

^b 1 Inst. 106.

^c Walter v. Rumball, 1 Lord Raym. 53. 1 Salk. 247.

^d Rex v. Clarke, Cowp. 612. Partridge v. Naylor, Cro. Eliz. 490.

impound the distress in any convenient part of the land.^a The second section of 1 & 2 P. & M. c. 2, does not apply to a distress impounded on the premises pursuant to the latter statute.^b

At common law, if living chattels were put into a pound overt, the owner at his peril was bound to sustain them; but if put into a private pound, the distrainer was bound at his peril to supply them with provision.^c But by 5 & 6 W. IV, c. 5, the distrainer is in all cases, where cattle are put into a pound overt, as well as covert, bound to supply them with necessary provisions, the value of which he may recover from the owner. The distrainer cannot work or use the thing distrained, as he has only the custody of it as a pledge; he may, however, milk cows and other milch kine, because it may be necessary to their preservation.^d

*810
The party distraining must supply cattle with provisions

2.—*Sale of a distress.*] The distress being considered merely as a pledge, could not at common law be sold; but by 2 W. & M. sess. 1, c. 5, s. 2, it is enacted, "that, where any goods or chattels shall be distrained for any rent reserved and due upon any contract, and the tenant or owner of the goods shall not within five days next after such distress, and notice thereof, with the cause of such taking left at the chief mansion-house, or other most notorious place on the premises charged with the rent, replevy the same, the person distraining may, with the sheriff or under-sheriff of the county, or constable of the hundred, parish, or place, where the distress is taken, cause the distress to be appraised by two sworn appraisers, whom such sheriff, &c., shall swear to appraise them truly, and after such appraisement, may sell the same towards satisfaction of the rent, and the charges of the distress and appraisement, leaving the overplus, if any, in the hands of the sheriff, &c., for the owner's use."^e

Distress to be sold after five days unless replevied.

In the notice of the sale of a distress it is not necessary to set forth at what time the rent became due for which the distress has been made,^f nor need the time of taking the goods be expressed therein; for a man may distrain for one cause and justify for another.^g It has been held, that notice to the tenant was sufficient under this act, the sole object of the statute being

*811

^a See *ante*, 800.

^b *Child v. Chamberlain*, 5 B. & Ad. 1049. (37 Eng. C. L. 263.) 3 Nev. & M. 520.

^c 1 Inst. 4.

^d Bac. Ab. tit. Dist. (D. 2.) A pound-keeper is bound to receive every thing offered to his custody, and is not answerable whether the thing was legally impounded or not. An action of trespass, therefore, will not lie against him merely for receiving a distress, though the original taking be tortious; but if he goes beyond his duty, and assents to the trespass, it may be a different case. *Branding v. Kent*, Cowp. 476.

^e This statute does not affect distresses *damage feasant*, therefore they remain, as they were at common law, mere pledges, and the sale of them will make the party distraining a trespasser *ab initio*. *Dorton v. Pickup*, S. N. P. 674.

^f Per Buller, J., in *Moss v. Gallimore*, Doug. 280.

^g *Crowther v. Ramsbottom*, 7 T. R. 654. *Etherton v. Pollewell*, 1 East, 139.

that the party should have notice; which object was more effectually attained by a notice given to the party himself, than by a notice left at the mansion-house, or most notorious place on the premises.^a(1)

If goods be distrained for rent the landlord must wait five whole days, *i. e.* five times twenty-four hours, before he sells, and if he does not, he is liable to an action. Thus, where a distress was made on Friday at two p. m., and the sale was on the following Wednesday at eleven, a. m., the sale was held to be wrongful.^b(2) The landlord may remain a reasonable time on the premises after the expiration of the five days for the purpose of appraising and selling the goods distrained.^c But where one who entered under a warrant of distress for rent in arrear, continued in possession of the goods upon the premises for fifteen days during the last four of which he was removing the goods, which were afterwards sold under the distress; held, that he was liable in trespass for continuing on the premises and disturbing the plaintiff in the possession of his house after the time allowed by law.^d The consent of the tenant, it seems, will justify him in remaining on the premises beyond the proper time.^e

A tenant whose standing corn and growing crops have been seized as a distress for rent before they were ripe, cannot maintain an action on the case under the above statute against the landlord or his bailiffs for not selling the same before five days *812 *had elapsed after the seizure, as such sale was altogether void.^f The statute, though it authorises a sale after five days, does not take away the right to replevy after that period if the goods be not sold; *secus* after the sale; for the purchaser is entitled to retain the goods.^g

Appraisement of the goods. Before the goods distrained can be sold, they must be appraised by *two* sworn appraisers,^h of whom the party distrain-

^a *Walter v. Rumball*, 1 Lord Raym. 53. 12 Mod. 76. 1 Salk. 247.

^b *Harper v. Taswell*, 6 C. & P. 166. (25 Eng. C. L. 336.) *Wallace v. King*, 1 H. Bl. 13.

^c *Pitt v. Shew*, 4 B. & A. 208. (6 Eng. C. L. 403.) But see *Griffin v. Scott*, 2 Stra. 717. It seems that the landlord must sell at the end of five days. See *ante*, 800, n.

^d *Winterborne v. Morgan*, 11 East, 395. And see *Etherton v. Popplewell*, 1 East, 139.

^e *Harrison v. Barry*, 7 Price, 690. *Fisher v. Algar*, 2 C. & P. 374. (12 Eng. C. L. 179.)

^f *Owen v. Legh*, 3 B. & A. 470. (5 Eng. C. L. 346.)

^g *Jacob v. King*, 5 Taunt. 451. (1 Eng. C. L. 154.)

^h 2 W. & M. c. 5, s. 2. *Bishop v. Bryant*, 6 C. & P. 484. (25 Eng. C. L. 500.) *Tindal*. It has, however, been held that where the rent distrained for does not exceed 20*l.*, only one sworn appraiser is necessary, since 57 Geo. III, c. 93. *Fletcher v. Saunders*, 6 C. & P. 747. (25 Eng. C. L. 630.) 1 M. & Rob. 375. If the tenant,

(1) (An omission to give notice does not make the landlord a trespasser. *McKinney v. Reader*, 6 Watts, 34.)

(2) (If the fifth day be Sunday, the following Monday will be estimated as the fifth day. *McKinney v. Reader*, *supra*.)

ing cannot be one, for he is interested in the transaction.^a The appraisers must be sworn before the constable of the parish where the distress is taken,^b who must attend and swear them *before* the appraisement is made.^c A distress sold at the appraised value is intended to have been sold at the best price since the law relies upon the appraisers having been sworn.^d It has, however, been held on a count for not selling goods distrained at the best prices, that the plaintiff may give evidence to show that the goods were allowed to stand in the rain, and that they were improperly allotted.^e

The expenses of levying a distress for rent for less than twenty pounds, are regulated by 57 Geo. III, c. 93,^f the second section of which gives justices a summary jurisdiction to administer a remedy to parties aggrieved by extortion. Sect. 6 provides that every broker or other person who shall make and levy any distress whatsoever, shall give a copy of his charges *and of all the costs and charges of any distress whatsoever, signed by him to the person whose goods shall have been distrained, although the amount of rent demanded shall exceed twenty pounds. It has been held under this section that a landlord who does not interfere personally in the distress, is not liable for the neglect of the broker employed by him to make the distress in not delivering a copy of the charges of the distress.^g

*813

SECTION X.

SECOND DISTRESS.

By 17 Car. II, c. 7, in all cases where the value of the cattle A second
distrained shall not be found to be of the full value of the distress
arrears distrained for, the party to whom such arrears are may be
due, his executors or administrators, may distrain again for made if
the said arrears; but a second distress cannot, it seems, be the first be
justified, where there is enough which might have been taken not suffi-
cient.
upon the first, if the distrainer had then thought proper.^a If

to save expense, requests that appraisers may not be called in, and in consequence the broker who made the seizure values the goods, the tenant cannot, in an action, complain of that which was done as an irregularity. *Bishop v. Bryant, supra.*

^a *Westwood v. Cowne*, 1 Stra. 172. *Andrews v. Russell*, B. N. P. 81. *Lyon v. Weldon*, 6 Moore, 629. 2 Bing. 334. (9 Eng. C. L. 424.)

^b *Avenell v. Croker*, M. & M. 172. (22 Eng. C. L. 281.)

^c *Kenny v. May*, 1 M. & Rob. 56.

^d *Walter v. Rumball*, 1 Lord Raym. 53.

^e *Poynter v. Buckley*, 5 C. & P. 512. (24 Eng. C. L. 433.)

^f The 7 & 8 G. IV, c. 17, extends the same provisions to distresses for rates and taxes under 20*l.*, which the above statute contains respecting distresses for rent.

^g *Hart v. Leach*, 1 Mees. & Wels. 560. 2 Gale.

^h *Woodf. L. & Ten.* 335.

a man, however, seize for the whole sum that is due to him, and only mistake the value of the goods seized, which may be of uncertain or imaginary value, as pictures, jewels, &c., there is no reason why he may not afterwards complete his execution by making a full seizure.^a

If the plaintiff in replevin be nonsuited, the defendant may again distrain the same goods for rent subsequently accrued previously to his executing his *retorno habendo*, without waiving his action against the sureties in the bond.^b

To a cognisance for rent in arrear; a plea in bar, that the defendant, on a former occasion, made a distress for the same rent, and took goods liable to distress, sufficient to discharge the rent in arrear and the costs of the distress, and might thereby have paid the arrears of rent, but neglected so to do, and wrongfully made a second distress for the same rent,
 *814 *was held ill on special demurrer, assigning for cause that the plea did not show that the rent was satisfied by the former distress.^c

SECTION XI.

RESCOUS OR POUND BREACH.

What
amounts
to a res-
cue.

RESCUE is the taking away and setting at liberty again a distress taken for rent or damage feasant, *after* it has been in the possession of the party distraining.^d Preventing a person from making a distress, is no rescue.^e If cattle distrained go on the premises of the owner while being driven to the pound and he refuses to deliver them up upon demand by the distrainer, it is a rescue in law.^f But where the plaintiff distrained the defendant's cattle *damage feasant*, and went to apprise the defendant, and during his absence the cattle escaped into the defendant's grounds for half an hour from which the plaintiff, on his return, drove them into his own yard; it was held, that the defendant having taken them from thence, it was no rescue; for permitting the cattle to go on the defendant's ground was an abandonment of the distress.^g

If a distress is taken without cause, as where rent is not due, the owner may make rescous before the distress is impounded. So, if the owner tender the rent before distress

^a *Hutchins v. Chambers*, 1 Burr. 579.

^b *Hefford v. Alger*, 1 Taunt. 218.

^c *Hudd v. Ravenor*, 5 Moore, 542. 2 B. & B. 662. (6 Eng. C. L. 306.) *Lingham v. Warren*, 2 B. & B. 36. (6 Eng. C. L. 10.) 4 Moore, 409.

^d B. N. P. 84. 1 Inst. 160, b. F. N. B. 101.

^e *Id.*

^f 1 Inst. 151.

^g *Knowles v. Blake*, 5 Bing. 499. (15 Eng. C. L. 517.) 3 M. & P. 314.

taken: But, after the distress is impounded, the owner cannot break the pound, and take the distress out of the pound; for it is then in the custody of the law.^a

If a hayward take cattle which are straying in a common or lane, and they are rescued as he is taking them to the pound, this rescue is indictable; but if the hayward take cattle which are *damage feasant* in the inclosed land of any private occupier, the rescue of them before they get to the pound is not indictable; as in the latter case, till the cattle get to the pound, the hayward is to be considered the mere servant of the occupier.^b *815

At common law, if any person broke the pound, or any part of it, and took away the cattle, it was deemed a breach of the peace; besides, the distrainer might take the cattle again, wherever he found them, and again impound them.^c By 5 & 6 W. IV, c. 59, s. 5, any person may enter a pound to supply food and nourishment to cattle confined therein, without being liable to any action or proceeding of any kind by reason of such entry.

By stat. 2 W. and M., first sess. c. 5, s. 4, it is enacted, "that upon any pound breach, or rescous of goods or chattels distrained for rent, the party grieved shall, in a special action on the case, for the wrong thereby sustained, recover treble damages and costs against the offenders, or against the owners of the distress, in case the same be afterwards found to have come to their use or possession." In the construction of this statute, it has been held, that the word "treble" refers to the words "costs," as to the word "damages," and consequently, that the costs shall be treble, as well as the damages.^d So it has been held, that a tender of the rent after the cattle were impounded, was no answer to an action under this statute.^e A plea of recaption, after a rescue, must aver that the recaption was on fresh pursuit.^f

Remedy
for rescous
or pound
breach.

SECTION XII.

REMEDY FOR A WRONGFUL DISTRESS.

WHERE the goods or chattels of a party are wrongfully distrained, his remedy is by an action of replevin, or trespass, or trover for the value; or detinue for the thing itself distrained;

^a 1 Inst. 47, b. 160, b.

^b Rex v. Bradshaw, 7 C. & P. 233. (32 Eng. C. L.) Coleridge.

^c 1 Inst. 47, b. 160, b.

^d Lawson v. Story, 1 Lord Raym. 19.

^e Firth v. Purvis, 5 T. R. 432.

^f Rich v. Woolley, 7 Bing. 651. (20 Eng. C. L. 274.) 5 M. & P. 663.

or if the goods taken be converted into money, he may waive the tort and bring assumpsit for money had and received. The most usual remedy for a wrongful distress is replevin, which shall be considered under a distinct head. Independently of

*816 *these remedies for a wrongful distress, an action on the case lies where the party, having a right to distrain, is guilty of an abuse or irregularity in making or disposing of the distress. At common law, an abuse of a distress made the party distraining a trespasser *ab initio*.^a But now, by 11 G. II, c. 19, s. 19, "where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent; the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*, but the party grieved may recover satisfaction for the special damage in an action of trespass or on the case,"^b at the election of the plaintiff; and if he recover he shall have full costs." But by s. 20, "no tenant or lessee shall recover in such action, if tender of amends has been made before action brought." By stat. 17 Geo. II, c. 38, s. 8, "where any distress shall be made for money justly due for the relief of the poor, the distress shall not be deemed unlawful, nor the party making it a trespasser, on account of any defect or want of form in the warrant of appointment of overseers, or in the rate or assessment, or in the warrant of distress thereupon; nor shall the party distraining be deemed a trespasser *ab initio*, on account of any irregularity which shall be afterwards done by him, but the party grieved may recover satisfaction for the special damage in an action of trespass, or on the case, with full costs; unless tender of amends is made before action brought."

When a distress shall not be deemed unlawful, nor the party making it a trespasser *ab initio*, on account of a defect or irregularity.

Remedy for an excessive distress.

*817

Though at common law an action lay for an excessive distress,^c yet a remedy by an action on the case is also given by the statute of Marlbridge, 52 H. III, c. 4, which provides, "that distresses shall be reasonable, and that persons taking unreasonable distresses, shall be grievously amerced for the excess of such distresses. Though case is the proper remedy for excessive distress,"^d it has been held that trespass would lie where gold or silver was taken to an excess, apparent on the face of it; as where six ounces of gold and 100 ounces of silver were distrained for 6s. 8d.(1) The ground of that decision was, that gold and silver were of a certain and known value; but it

^a And in case of distress for *damage feasant*, this is still the law.

^b The true construction of the words *trespass on the case*, is that the party injured must bring trespass if the injury be trespass, and case if it be a subject matter of an action on the case; the nature of the irregularity determines the form of action. Hence, case might be brought for an irregularity in omitting to appraise the goods before selling them, and trespass for remaining in possession beyond the five days. *Winterbourne v. Morgan*, 11 East, 395, *ante*, 811. *Smith's Leading Cases*, 66.

^c 2 Inst. 107. Per Parke, B., in *Pigott v. Birtles*, 2 Gale, 21.

^d *Id.* *Sturch v. Clark*, 1 N. & M. 6.

(1) (See *McKinney v. Reader*, 6 Watts, 34.)

was said that in all other things of arbitrary and uncertain value, the action must be upon the statute.^a If a party distrains a single chattel, far exceeding the amount of rent due, he will not be liable to an action for excessive distress, if there be not other sufficient distress on the premises.^b It is not for every trifling excess that this action will lie, it must be disproportionate to some extent; express malice, however, is not necessary.^c A landlord is not bound to calculate very nearly the value of the property seized, but he must take care that some proportion is kept between that and the sum for which he is entitled to take it.^d

In order to support this action, the plaintiff need not prove the precise amount of rent due, as stated in the declaration, the substantial allegation being, that more was distrained for than was actually due.* Though the tenant tendered the rent before distress, whereby the distress was rendered unlawful, he may abandon his action of trespass and sue in case:† but trespass or case will lie under such circumstances.‡ A recovery in replevin is a bar to an action for an excessive distress.‡ *In an action for a vexatious and excessive distress, the plaintiff having received the taxed costs of his replevin on the distress, was held not entitled to recover as damages, the extra costs occasioned to him by the replevin.‡ A landlord is liable to some damages in an action on the case for an excessive distress, where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure; but the measure of damages is not the value of the crops, but the inconvenience and expense which the tenant sustains in being deprived of the management of them, or which he is put to in procuring sureties to a larger amount than he would otherwise have been in replevying the crops.‡ The question in such an action is, what the goods seized would have sold for at a broker's sale. If it be excessive, the plaintiff is entitled to recover the fair value of them.‡

* *Moor v. Mundy*, cited in *Hutchins v. Chambers*, 1 Burr. 590.

¹ Field v. Mitchell, 6 Esp. 71. Avenell v. Croker, M. & M. 172. (22 Eng. C. L. 281.)

^c Per Lord Ellenborough, C. J., in *Field v. Mitchell*, *supra*.

⁴ Per Bayley, J., in *Willoughby v. Backhouse*, 2 B. & C. 823. (9 Eng. C. L. 256.) And see *Sells v. Hoare*, 1 Bing. 401. (8 Eng. C. L. 359.) 8 Moore, 451. It seems that an action on the case does not lie against a landlord for distraining for more than the actual arrears of rent, unless the distress taken be of larger value than will satisfy the actual arrears. *Wilkinson v. Terry*, 1 M. & Rob. 377. Parke.

* *Sells v. Hoare*, 1 Bing. 401. (9 Eng. C. L. 359.) In case for an irregular distress, it is necessary to state correctly to whom the rent distrained for is due; for a variance in this respect is fatal. *Ireland v. Johnson*, 1 Bing. N. C. 169. (27 Eng. C. L. 341.) 4 M. & Scott. 706.

¹ *Branscomb v. Bridges*, 1 B. & C. 145. (8 Eng. C. L. 43.) 3 Stark. 171.

* *Holland v. Bird*, 10 Bing. 15. (25 Eng. C. L. 14.) 3 M. & Scott, 363.

^a Phillips v. Berryman, S. N. P. 679. 3 Dong. 286. (26 Eng. C. L. 112.)

¹ *Grace v. Morgan*, 2 Bing. N. C. 534. (29 Eng. C. L. 409.) ² 1 Hodges, 348.

1 Piggott v. Birtles, 1 Mees. & Wels. 441. 2 Gale, 21.

Wells v. Moody, 7 C. & P. 59. (32 Eng. C. L.) Parke.

Where a landlord distrained for more than was due, and removed the goods to an auctioneer's, who, upon receiving notice from the tenant not to sell, delivered back the goods; it was held, that as some rent was due, the auctioneer was not liable to the tenant in trover.^a

If the situation of the premises be strictly described, it must be proved as laid. Where they were stated to be in the parish of St. George the Martyr, Bloomsbury, and were proved to be in the parish of St. George, Bloomsbury, the plaintiff was nonsuited.^b The broker who made the distress, is a competent witness for the plaintiff, but not for the defendant.^c

^a *Whitworth v. Smith*, 1 M. & Rob. 193. 5 C. & P. 250. (24 Eng. C. L. 304.)

^b *Harris v. Cooke*, 9 Moore, 587. 8 Taunt. 539. (4 Eng. C. L. 204.)

^c *Field v. Mitchell*, 6 Esp. 72.

*CHAPTER XI.

EJECTMENT.

	PAGE
I. Of the nature of an action of ejectment.	
II. For what things ejectment will lie.	823
III. Of the title necessary to support ejectment.	828
IV. Who may bring ejectment.	840
V. When an actual entry must be made before ejectment.	853
VI. Notice to quit.	857
VII. Of the declaration.	878
VIII. Service of the declaration.	889
IX. Affidavit of service.	899
X. Judgment by default.	902
XI. Appearance of the defendant and proceedings thereupon. .	905
XII. When the court will stay the proceedings.	911
XIII. Proceedings under 1 G. IV, c. 87, where the tenant holds over.	918
XIV. Evidence in ejectment.	921
XV. The trial, judgment and execution.	942
XVI. Costs.	946
XVII. Writ of error.	948
XVIII. Trespass for mesne profits.	949

SECTION I.

OF THE NATURE OF AN ACTION OF EJECTMENT.

THE action of ejectment is a fictitious mode of legal proceeding by which almost all titles to lands and tenements may be tried, and possession obtained by the party entitled to it. It is termed a *mixed* action, being *real* in respect of the lands, but personal in respect of the damages and costs. It is also deemed a *possessory* action, because it is founded on the right to the possession of the premises in dispute.^a In the earlier period of our history, the only mode of recovering the possession of lands wrongfully withheld was by a real action or writ of assize, which were applicable only to freehold titles, estates for years *being then considered only a precarious possession, and as not transferring to the lessee any title to the land; the only remedy which a lessee had, in case he was wrongfully ousted by the lessor, was by a writ of covenant on the breach of contract, whereby he was enabled to recover his term as well as damages, if ousted by the lessor; but if dispossessed by any person claiming under the lessor, he could recover damages only from the lessor for a breach of the

The history and nature of ejectment.

*820

^a Runnington, 1.

covenant, but not the possession of the land from which he was ousted.^a

As a writ of covenant lay only between the immediate parties to the grant if the lessee was ejected by a stranger, his remedy was by a writ of *ejectione firmæ*, which was a mere personal action of trespass, whereby he was enabled to recover damages only, the true measure of which was the mesne profits but not the term, though in such a case the landlord himself might recover the possession by a real action.^b In progress of time, however, when agricultural interest became a subject of legislative regard, a full remedy was provided for the lessee, by the introduction of the writ of *quare ejecit infra terminum*, whereby the lessee was enabled to recover both his term and damages from any person whatsoever that ousted him. It is upon this writ that the modern action of ejectment is founded.^c The precise period when this remedy was adopted is not satisfactorily ascertained, but all the authorities agree that it was between the year 1455, in the reign of Hen. VI, and 1499, in the reign of Hen. VII.^d "The action of ejectment," said Lord Mansfield, C. J., "is the creature of Westminster Hall, introduced within time of memory, and moulded gradually into a course of practice by the rules of the courts."^e

*821

As originally a term for years only could be recovered in an action of ejectment, in order to convert it into a method of trying freehold titles, it was necessary that a term should be created. To obtain that requisite, the party claiming a right to the possession entered upon the premises in dispute, and *there sealed a lease for years, which he delivered to another person who accompanied him. An actual entry was necessary, for, according to the old law, it would be maintenance if a person not in possession conveyed a title to another. The lessee having acquired a right to the possession by means of the lease, remained upon the land, and then the person who came next upon the freehold *animo possidendi*, or by accident or by agreement beforehand, was accounted an ejector of the lessee, and a trespasser on his possession. An action of ejectment was then commenced against the person in possession or the party so entering, who was denominated the *casual* ejector. But as the person in possession might thus be deprived of his lands without having any opportunity of defending his title, when the action was instituted against any other person than himself, it was made a standing rule of court, that the plaintiff should not proceed against the casual ejector without serving the party in possession with notice of the proceedings or a copy

^a 3 Bl. Com. 200. Adams on Ejectment, 3.

^b *Id.* Runnington, 13.

^c Adams, 7. Runnington, 13. Fairclain d. Fowler v. Gower, 1 Bl. 300. See 3 Burr. 1296.

^d Runnington, 14. Adams, 9. 3 Bl. Com. 207.

^e In Fairclain d. Fowler v. Shamtitle, 3 Burr. 1292.

of the declaration. The party in possession having received such notice, might, upon application to the court, defend the suit in the name of the casual ejector, if he thought proper, and if he neglected to do so, the suit proceeded against the casual ejector. When the cause came on to be tried, the plaintiff was obliged to prove the lessor's title, since his own depended upon it. He was also obliged to prove the lease, his own entry on the premises, and his ouster by the defendant. The claimant's title was thus indirectly determined. In form an ejectment has been not inaptly described, "an ingenious fiction for the trial of title to the possession of lands; it appears as a trick between two to dispossess a third by a sham suit and judgment, an artifice which would be highly criminal, unless the court converted it into a fair trial with the proper party."^a

The proceedings in ejectment continued to be conducted in the manner above described until the time of Lord Chief Justice Rolle, who presided in the court of *upper* bench, so called during the protectorate, by whom a new method was invented *of trying titles by ejectment, without resorting to the troublesome, and sometimes inconvenient formalities which attended the actual making of the *lease*, *entry* and *ouster*.^b By the new method, the suit is conducted in fictitious names, and all the preliminaries required by the ancient practice are feigned, for no lease is sealed, no entry or ouster is actually made; the process consists entirely of a string of legal fictions.

*822

The following is a brief outline of the present system. *A.*, the party claiming title, delivers to *B.*, the party in possession, a declaration, in which *C.* is plaintiff and *D.* defendant, both fictitious persons, and in which it is stated that a lease for a term of years of the premises in question had been made by the party claiming the title to *C.*, who entered by virtue of the demise, and was afterwards, and during the term, ousted by *D.*, the defendant, who is termed the casual ejector. To this declaration a notice is annexed in the name of *D.*, directed to *B.*, the party in possession, informing him of the action being brought by *C.* and advising him to apply to the court for permission to defend his title; otherwise that he (*D.*) having no title, will suffer judgment to go by default against him, whereby *B.* will be turned out of his possession. If, upon the receipt of the declaration, *B.* does not apply to the court within a limited time for permission to be made defendant, he is supposed to have no title to the premises; and upon an affidavit that regular notice has been served upon him, the court will order judgment to be entered up against *D.*, the casual ejector, and possession of the lands will be given to *A.*, the claimant, by the sheriff. If, however, *B.* applies pursuant to the notice, for permission

^a Per Lord Mansfield, C. J., in *Faireclaim d. Foulter v. Shamtitle*, 3 Burr. 1394.

^b Style's Prac. Reg. 106. 3 Bl. Com. 202.

to defend the action, the court will allow him, upon condition that he enter into a rule of court, which is called *the consent rule*, by which he undertakes to confess at the trial, the lease, entry and ouster which we have seen are merely feigned in the proceedings, to have been regularly made, and to rely solely on the merits of his title; and, lest at the trial he should break his engagement, another condition is also added, *that in such case he shall pay the costs of the suit, and shall allow judgment to be entered against *D.*, the casual ejector.

*823

This rule having been entered into, the declaration is altered by making *B.* the defendant instead of *D.*, and the case proceeds to trial in the same manner as other actions. If *A.*, the party claiming, makes out his title, judgment is given for *C.*, the nominal plaintiff, and a writ is directed in his name to the sheriff to deliver possession; but if *B.* does not appear at the trial and confess lease, entry, and ouster, pursuant to his undertaking, *C.* must be nonsuited for want of proving these requisites; but judgment will in the end be entered for him against *D.*, the casual ejector, for the condition upon which *B.* was permitted to defend being broken, *C.*, the plaintiff, is put in the same situation as if there had been no appearance. But though judgment is entered up against *D.*, the casual ejector, execution will be stayed if, after default made by the tenant, the landlord, applies to be made defendant, and enters into the usual rule.^a

SECTION II.

FOR WHAT THINGS AN EJECTMENT WILL LIE.

For what things and by what description ejectment will lie. Does not lie for property not tangible.

AN ejectment will lie for all kinds of corporeal hereditaments, or for any thing whereon an entry can be made, and of which the sheriff can deliver possession. But it is not in general sustainable for the recovery of property, which in legal consideration is not tangible, as for an advowson, rent, common in gross, or other incorporeal hereditament; it is however for tithes, though an incorporeal hereditament.^b It is said, generally, that the description of the premises in dispute must be *sufficiently certain*, but no determinate rule is laid down as to the degree of certainty required. Formerly it was considered an

*824

*established principle that the description should be so certain as to enable the sheriff exactly to know, without any informa-

^a 11 G. II, c. 19. 3 Burr. 1296.

^b By 32 Hen. VIII, c. 7. 3 Bl. Com. 206. 2 Saund. 304, n. 12 B. N. P. 99. Runnington, 131, *et seq.*

tion from the plaintiff, of what to deliver possession.* This rule, however, has long since ceased to prevail. The same degree of certainty that was formerly required is not now necessary. The practice is for the sheriff to deliver possession of the premises recovered according to the directions of the plaintiff, who therein acts at his peril.^b

An ejectment may be sustained for an *orchard*, because it is a word of certain signification, and the sheriff may with certainty deliver it in execution. So, for a stable and a cottage, or for one curtilage and a garden.^c So, for a house;^d or a chamber in the middle story of a house.^e It has been held, that it would not lie for a *kitchen*; for though the word be well understood in common parlance, yet, as any chamber in the house may be applied to that use, it is not sufficiently certain; besides, the kitchen may be changed between judgment and execution;^f nor will it lie for a *close*, because that is of uncertain extent; nor for a *piece* of land; nor for the fourth part of a meadow, without setting forth the particular contents or number of acres.^g But ejectment for a close called *D.*, containing three acres of land, was held good.^h An ejectment will lie for corn-mills, without saying of what kind, whether wind-mills or water-mills.ⁱ So, it will lie for a church, if demanded by the name of a messuage.^j So, for a certain place called the vestry, in *D.*^k

By what description.

An ejectment will not lie for a *tenement*, because many incorporeal hereditaments are included in that appellation; nor for "a messuage or tenement," for the signification of the word "tenement" being more extensive than that of the word messuage, it is not sufficiently certain what is intended to be demanded;^m not for a messuage and tenement.ⁿ But where in ejectment for "a messuage and tenement" a verdict was entered generally, the court permitted the plaintiff (pending a rule nisi to arrest the judgment) to enter the verdict according

*825

^a *Bindover v. Sindercombe*, 2 Lord Raym. 1470. *Runnington*, 139.

^b *Id.* *Cottingham v. King*, 1 Burr. 623. *Connor v. West*, 5 Burr. 2672.

^c *Wright v. Wheatley*, Cro. Eliz. 854. *Rcyston v. Eccleston*, Cro. Jac. 654. *Lady Dacre's Case*, 1 Lev. 58. *Runnington*, 140.

^d *Royston v. Eccleston*, *supra*.

^e *Rawson v. Maynard*, Cro. Eliz. 286. *Sullivan v. Seagrave*, Stra. 695. 3 Wile. 49.

^f *Ford v. Leake*, Noy, 109. *Runnington*, 141. It is clear, however, that ejectment would lie for a *kitchen* at the present day.

^g *Id.* *Samel's Case*, 11 Co. 55. *Knight v. Syme*, 1 Salk. 254. *Pemble v. Stern*, 1 Lev. 213.

^h *Wykes v. Sparrow*, Cro. Jac. 425. *Massey v. Rice*, Cowp. 349.

ⁱ *Fitzgerald v. Marshall*, 1 Mod. 90. ^j *Hillingsworth v. Brewster*, 1 Salk. 256.

^k *Hutchinson v. Puller*, 3 Lev. 96.

^l *Goodtitle v. Walton*, 2 Stra. 834. *Copleston v. Pipes*, 1 Lord Raym. 191. *Adams*, 25.

^m *Ashworth v. Stanley*, Styl. 364. *Wood v. Payne*, Cro. Eliz. 186. *Goodright d. Welsh v. Flood*, 3 Wils. 23.

ⁿ *Doe d. Bradshaw v. Plowman*, 1 East, 441, overruling *Doe d. Stewart v. Denton*, 1 T. R. 11.

to the judges' notes for the message *only*, and that, without releasing the damages;^a for it is a settled rule that if the same count contains two demands or complaints, for one of which the action lies and not for the other, all the damages shall be referred to the good cause of action, although it would be otherwise if they were in separate counts.^b Ejectment will not lie for a "tin-bound," for it is a mere easement and gives no possession of the surface.^c

But an ejectment will lie for "a message or tenement" with other words expressing its meaning, as a message or tenement called the *Black Swan*, for the addition reduces it to the certainty of a dwelling-house.^d So, for a message or burgage, for both signify the same thing in a borough.^e An ejectment will lie for a *boilery of salt*, although by the grant of a boilery of salt the grantee is only entitled to a certain proportion of the number of buckets of salt water drawn out of a particular salt water well, for by the grant of a boilery of salt, the soil shall pass, inasmuch as it is the whole profit of the soil.^f So, for a *coal mine*; for though a man may have a right to the mine without any title to the soil, yet the mine being fixed in a certain place, the sheriff has a certain thing before him of which *he can deliver possession.^g But when a grant of mines operates only as a license to work mines within a certain district during the term, a party cannot maintain ejectment in respect of mines within the district which he has not opened, or which having opened he has abandoned.^h An ejectment will lie for a *fishery*, though it was formerly considered otherwise.ⁱ Ejectment will lie for a pool or pit of water, for those words comprehend both land and water.^k But it will not lie for a watercourse or rivulet, unless the land through which it flows belong to the claimant, in which case it may be declared upon as so many acres of land covered with water.^l So, it will lie by the owner of the soil for land which is part of the king's highway; his recovery of it, however, will be subject to the public easement.^m So, it will lie for the first grass or aftermath, for the grantee is entitled to all the profits of the land for the time being.ⁿ So, it will lie for the pasture of a hundred sheep,^o

^a Goodtitle d. Wright v. Otway, 3 East, 357.

^b Doe d. Laurie v. Dyball, 8 B. & C. 71. (15 Eng. C. L. 154.) 1 Moor & P. 330. (17 Eng. C. L. 184.) 9 M. & Ry. 184.

^c Doe d. Falmouth (Earl of) v. Alderson, 1 Gale, 441. 1 Mees. & Wels. 210.

^d Burbury v. Yeomans, 1 Sid. 295. Runnington, 144. Adams, 26.

^e Id. Danvers v. Wellington, Hard. 173. Rochester v. Rickhouse, Pop. 203.

^f Smith v. Barrett, Sid. 161. 1 Lev. 114. Co. Litt. 4. Adams, 19.

^g Id. Comyn v. Kineto, Cro. Jac. 150. Noy, 121.

^h Doe d. Hanley v. Wood, 2 B. & A. 724. Croker v. Fothergill, id. 652.

ⁱ Per Ashhurst, J., in R. v. Arlesford, 1 T. R. 358.

^j Molineaux v. Molineaux, Cro. Jac. 144. Herbert v. Laughlyn, Cro. Car. 429.

^k Co. Litt. 5. Challenor v. Thomas, Yelv. 143.

^l Id. ^m Goodtitle d. Chester v. Alker, 1 Burr. 133.

ⁿ Ward v. Petifer, Cro. Car. 362. R. v. Stoke, 2 T. R. 451.

^o Anon. 2 Dal. 95.

and for the herbage; because the grantee has an interest in the soil.^a But not for pannage, because it is only the mast which falls from the trees and not part of the soil itself.^b

In ejectment for land the particular species should be mentioned in the description, whether *pasture*, *meadow*, &c., because land, in its legal acceptation, signifies only arable land.^c An ejectment for ten acres of underwood;^d fifty acres of gorze and furze;^e fifty acres of moor and marsh;^f ten acres of pease,^g has been held sufficient.

Lands will be sufficiently described by terms used in the district or county in which they are situate. Thus, ejectment will lie for the recovery of "five acres of alder carr," in Norfolk, because alder carr is a term well known in that county, signifying land covered with alders.^h So, for a beast gate in Suffolk,ⁱ and for cattle gates in Yorkshire.^j So, for a *township*, for a *kneave* for so many acres of *bog*, or of *mountain*, in Ireland, the word mountain in that country being rather a description of quality than the situation of the land.^k So, an ejectment for fifty "messuages, one hundred acres of land in all those one moiety or full half of the town and lands of C.;" was held sufficiently certain.^l But ejectment will not lie in England for so many acres of mountain or of waste, because both waste and mountain comprehend, in England, many sorts of land.^m

*827
By what description.

Ejectment will lie for a manor; or a moiety of a manor generally, without any description of the number of acres or species of land contained therein; but it is more safe to describe the quantity and species of the land.ⁿ So, it will lie for a rectory, consisting of church, glebe-lands and tithes, on the principle that it resembles a manor. Where a party was presented to a rectory, in consideration of his having given a bond to resign in favor of a particular person at the request of the patron; and was instituted and inducted; and such bond was held to be void on the ground that it was simoniacal, and the king then presented A. B., and he was instituted and inducted; held, that he might maintain ejectment for the rectory against the person who had been simoniacally presented, because the church was void; but if it had been full *quare impedit* was the proper remedy.^o

It has been held that ejectment will lie for tithes to get into

^a *Wheeler v. Toulson*, Hard. 330.

^b *Pemble v. Sterne*, 1 Lev. 212. 1 Sid. 416.

^c *Massey v. Rice*, Cowp. 346. *Savel's case*, 11 Co. 55.

^d *Warren v. Wakeley*, 2 Roll. 482.

^e *Fitzgerald v. Marshall*, 1 Mod. 90.

^f *Connor v. West*, 5 Burr. 2672.

^g *Odingsall v. Jackson*, 1 Brown, 149.

^h *Barnes v. Paterson*, 2 Strd. 1063.

ⁱ *Bennington v. Goodtitle*, *id.* 1084.

^j *Metcalf v. Roe*, Cas. temp. Hard. 167. *Cottingham v. King*, 1 Burr. 623.

^k *Runnington*, 147.

^l *Coyne v. Bartley*, 1 Alcock & Napier, 310.

^m *Hancock v. Price*, Hard. 57.

ⁿ *Adams*, 59. *Hems v. Stroud*, Latch 61.

^o *Doe d. Watson v. Fletcher*, 8 B. & C. 25. (15 Eng. C. L. 151.)

- *828 the receipt of the profits of a benefice, although there is no *glebe-land.^a In ejectment for tithes, the particular species of tithe demanded should be specified in the declaration, as of hay, wheat, &c., or the description will be bad for uncertainty.^b But it is not necessary to specify the quantity of each species; it will be sufficient to say "of certain tithes of hay, corn," &c.^c A common appendant or appurtenant may be recovered in ejectment brought for the lands to which it is appendant or appurtenant, provided such right of common be mentioned in the description of the premises; because he who has possession of the land has also possession of the common, and the sheriff by giving possession of the one executes the writ as to the other.^d

SECTION III.

OF THE TITLE NECESSARY TO SUPPORT EJECTMENT.

	PAGE		PAGE
1. The plaintiff must have a legal title, and a right of entry.		barred.	829
2. How a right of entry may be		3. What constitutes adverse possession, so as to bar a right of entry.	831

The plaintiff must have the legal title, and the right of possession, at the time of the demise laid.

1.—*The plaintiff must have a legal title, and a right of entry.*] As the party in possession of property is presumed to be the owner until the contrary appears, the claimant in ejectment must show a good title in himself; he cannot found his claim on the weakness of that of the defendant; for possession gives the defendant a right against every man who cannot establish a good title.⁽¹⁾ The plaintiff must be clothed with the legal title to the lands in dispute.^f An equitable title will not avail:⁽²⁾ so fixed and immutable is this principle, that a trustee may maintain ejectment against his own *cestui que trust*,^g and an unsatisfied term outstanding in trustees will bar

^a Doe d. Moore v. Ramsden, Harr. Land. & Ten. 755.

^b Adams, 29. Harper's case, 11 Co. 25. 1 Roll. 66.

^c Anon. Dyer, 116.

^d Newman v. Holdmyast, 1 Stra. 54. Baker v. Rose, Cas. temp. Hard. 127.

^e Roe d. Haldane v. Harvey, 4 Burr. 2484.

^f Doe d. Da Costa v. Wharton, 8 T. R. 2. Goodtitle d. Jones v. Jones, 7 T. R. 43, 47. Doe d. Blake v. Luxton, 6 T. R. 269.

^g Roe d. Read v. Read, 8 T. R. 118.

(1) (Medley v. Williams, 7 Gill & Johns. 61.)

(2) (Ejectment may be maintained in Pennsylvania on an equitable title, there being no Court of Chancery in that state, and the common law courts being governed by equity principles. 1 Wharton's Dig. Titles, Equity and Ejectment.)

the recovery of *the heir at law, even though he claims only subject to the charge.^a

An assignment, by way of mortgage, of copyhold premises by a common law conveyance of lease and release, and not by any surrender to the lord according to the custom of the manor, does not confer on the mortgagee a sufficient title to maintain ejectment even against the mortgagor, for he has only an *equitable* interest in the premises.^b

Independently of having the legal title, the claimant must also have the right of possession, or in other words he must have a right of entry on the land, at the time of the demise, laid in the declaration; for though an actual entry is not now necessary, as it was formerly, in order to enable the lessor of the plaintiff to maintain the action, still the principles of the action remain the same, and a right to make an entry continues to be requisite.^c If, however, he be entitled to the possession at the time of the demise laid, it will be sufficient, though it be devested before trial.^d

2.—*How a right of entry may be barred.*] The plaintiff, we have seen, must have a legal title, a right of possession or entry, in order to maintain an action of ejectment. It is observable that there are three ways whereby a right of entry or possession may be destroyed, without affecting the title to the property, except as to the remedy: first, by discontinuance; secondly, by descent cast; and thirdly, by the statute of limitations. How a right of possession may be lost.

First. A discontinuance of an estate signifies such an alienation made or suffered by any person seised of an estate tail, or in *autre droit* in things which lie in livery, as takes away the entry of the person entitled after the death of the alienor; as if a tenant in tail makes a larger estate of the land than he is entitled to do, as a feoffment in fee simple, or for the life of the feoffee or in tail, all which are beyond his power to make; although the entry of the feoffee is lawful during the life of the feoffor, yet if he retain the possession after the death of the feoffor, it is a discontinuance of the estate; and neither the heirs in tail, nor they in remainder or reversion expectant on the determination of the estate tail, can enter or take possession of the lands so alienated.^e Discontin-
nuance.

*Secondly. Descents which take away entries are where *830
any one seised by any means whatsoever, of the inheritance of Descent
a corporeal hereditament dies, whereby the same descends to cast.

^a Doe d. Hodson v. Staple, 2 T. R. 684. A contrary principle, however, formerly prevailed. See Doe d. Bristowe v. Pegg, 1 T. R. 759. B. N. P. 110. And other cases collected in Adams on Ejectment, 33.

^b Doe d. North v. Webber, 3 Bing. N. C. 929. (32 Eng. C. L.)

^c Adams, 11, 33.

^d Doe d. Morgan v. Bluck, 3 Camp. 447.

^e 3 Bl. Com. 171. Runnington, 45. Adams, 35; to which the reader is referred for further elucidation of the doctrine of continuance.

his heir; in this case, however feeble the right of the ancestor might be, the *entry* of any other person who claims title to the freehold is taken away, and he cannot recover possession against the heir by this summary method, but is driven to his action to gain a legal seisin of the estate; and this, first, because the heir comes to the estate by act of the law, not by his own act; the law therefore protects his title, and will not suffer his possession to be devested, till the claimant hath proved a better right.^a It would be foreign to the design of this work, to enter more fully into the doctrine of descent; the reader who is desirous of being better informed on that subject, may advantageously consult the authorities referred to in the note.

By the 3 & 4 W. IV, c. 27. s. 39, "no descent cast, discontinuance, or warranty which may happen or be made after 31st December 1833, shall toll or defeat any right of entry or action for the recovery of land."

Statute of
Limita-
tions.

Thirdly. A right of entry may be barred by the statute of limitations. The 21 Jac. I, c. 16. s. 1, enacts, "that no person shall make any entry upon any lands, &c., but within twenty years after his right and title shall first descend or accrue; and in default thereof, such person and his heir shall be utterly disabled from such entry." Sec. 2. contains the usual savings for "infants, feme-coverts, insane persons," &c.

The 3 & 4 W. IV, c. 27, s. 3, enacts, "that no person shall make an entry, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry shall have accrued," &c.^b

*831

Neither the king^c nor ecclesiastical persons are within these enactments.^d But with these exceptions the statute applies to all persons capable of a right to enter. Therefore, whenever the defendant or the parties under whom he claims, has had an *adverse* possession for twenty years, the plaintiff cannot recover in this form of action, unless he was prevented from prosecuting his claim earlier by reason of some of the disabilities allowed by the statute.

The pos-
session
must be
adverse.

3.—*What constitutes adverse possession so as to bar a right of entry.*] The twenty years' possession in order to bar the claimant's right of entry, must be adverse to his title. What

^a 3 Bl. Com. 176. Co. Litt. 237. Runnington, 50. Adams, 41. In the latter work it is stated that it is scarcely possible to suggest a case in which the doctrine of descent cast can be now so applied as to prevent a claimant from maintaining ejectment, as from the principles of disseisin at election he may always lay his demise in the time of the ancestor, and elect not to be disseised.

^b See title "Statute of Limitations," *post*.

^c But by 9 Geo. III, c. 16, the king is barred, unless he claim within sixty years after his title shall have accrued.

^d An adverse possession for twenty years has been held to be a bar only to the same incumbent who submitted to the possession, but not to his successor. *Runcorn v. Dee d. Cooper*, 5 B. & C. 696. (12 Eng. C. L. 359.) But see 3 & 4 W. IV, c. 27, ss. 29 et seq. *post*.

constitutes an adverse holding it is not easy to define; but whenever the parties claim under the same title, or when the possession of one party is consistent with the title of the other, or when the claimant has never in contemplation of law been out of possession, and when the party in possession has acknowledged the title of the party claiming, an adverse possession will be negatived, so as to prevent the operation of the statute of limitations.(1)

As if a man seised of certain land in fee have issue two sons, and die seised, and the younger son enter by abatement into the land; the statute will not operate against the elder son; for when the younger son so abated into the land, after the death of his father, before any entry made by the elder son, the law intends that he entered claiming as heir to his father, by which title the elder son also claims.^a So, where the defendant made title under the sister of the lessor of the plaintiff, and proved that she had enjoyed the estate above twenty years, and that he had entered as heir to her; the court would not regard it, because her possession, being construed to be by courtesy and not to make a disherison, was by license to preserve the possession of her brother, and, therefore, not within the statute; but if the brother had ever been in actual possession, and ousted by *his sister, it would have been otherwise; for then the entry could not possibly be construed to be to preserve his possession.^b But now by 3 & 4 W. IV, c. 27, s. 13, "when a younger brother or other relation of the person entitled as heir to the possession, or receipts of the profit of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir."

Where the parties claim under the same title the possession is not adverse.

*832

If a man have a good title to the possession of a copyhold, as tenant by the curtesy, by the custom of the manor, his possession of the copyhold after his wife's death will be referred to that, and not to any adverse title; though he were admitted

Where possession is consistent

^a Co. Litt. s. 396. Adams, 47.

^b *Id.* B. N. P. 102. Co. Litt. 242, b. And see *Doe d. Draper v. Lawley*, 3 N. & M. 331; (28 Eng. C. L. 400;) where it was held that in ejectment, it was no answer to a prima facie title from twenty years' possession, that such possession was in continuation of that of a sister, who entered by abatement into the land to which her elder brother (whose issue was alive) was entitled as heir, and who died more than twenty years before the ejectment was brought.

(1) (For the American cases on the subject of adverse possession, see *M'Call v. Nerly*, 3 Watts, 70. *Jones v. Porter*, 3 Penn. R. 134. *Lodge v. Patterson*, 3 Watts, 77. *App v. Dreisbach*, 2 Rawle, 305. *Mackentile v. Savoy*, 17 Serg. & R. 104. *Sweeney v. McCulloch*, 3 Watts, 345. *M'Masters v. Bell*, 2 Penn. 183. *Hopkins v. Robinson*, 3 Watts, 205. *Jackson v. French*, 3 Wend, 337. *Jackson v. Mancius*, 3 Wend. 357. *Jackson v. Britton*, 4 Wend. 507. *Jackson v. Warford*, 7 Wend. 62. *Jackson v. Oliz*, 8 Wend. 440. *Livingston v. Peru Iron Co.* 9 Wend. 523. *Sharp v. Brandon*, 15 Wend. 597. *Bogardus v. Trinity Church*, 4 Paige, 178. *Gwynn v. Jones*, 2 Gill & Johns. 173. *Miller v. McIntyre*, 6 Peters, 61. *Green v. Lessee of Neal*, 6 Peters, 291. *Lessee of Ewing v. Burnett*, 11 Peters, 41. *Hapgood v. Burt*, 4 Verm. 155. *Leach v. Woods*, 14 Pick. 461.)

with the title of the claimant, it is not adverse.

Possession of copyhold lands.

*833

after his wife's death to hold to him pursuant to the settlement. As where by a marriage settlement, a copyhold estate of the wife was limited to the use of the survivor in fee, but no surrender was made to the use of the settlement, and after the death of the wife, the husband was admitted to the lands, pursuant to the equitable title acquired by the settlement; it was held that his possession being consistent with the title of the heir at law, the latter might bring ejectment against the devisee of the husband, within twenty years after the husband's death, though more than twenty years after the death of the wife; but if the husband had no other title than the admission, twenty years' possession by him would have barred the heir.^a And though one third of the copyhold had been settled many years before upon a third person for life, but no surrender having been made to the trustees under the settlement, the legal estate had remained in the heirs of the tenant last seised and admitted, and the steward of the manor appointed by the heir at law and her husband had, in his accounts, after the wife's death, (which was evidence of his having *done the same in her lifetime,) for above twenty years back, debited himself with the receipt of two-thirds of the rent for the husband on account of his wife, and the remaining one-third for such other person claiming under the settlement; yet such payment to the latter must be taken to have been made by the consent of the person entitled at law to the whole, so as to do away the notion of an adverse possession by the husband of that one-third, distinct from his possession of the other two-thirds, as tenant by the curtesy after his wife's death in answer to a claim by the heir at law of the wife against the devisee of the husband who set up an adverse possession for above twenty years after the wife's death.^b

So where *M.*, being seised in fee of an undivided moiety of an estate, by her will, made many years before her death, devised the same to her nephew and two nieces, as tenants in common; one of her nieces having died in her lifetime, leaving an infant daughter, *M.* by another will, but which she never executed, devised the estate to her nephew, her surviving niece, and that infant; upon the death of *M.* her nephew and surviving niece by deed covenanted to carry her unexecuted will into effect, and to convey one third of the estate to a trustee, to convey to the infant when she reached twenty-one, or to her issue, if she died before twenty-one leaving any, or otherwise to themselves again; but no conveyance was ever executed in pursuance of the deed. The infant died under age and without issue, but the rents were received by her trustee for her use during her life. In ejectment by the devisee of the

^a Doe d. Milner v. Brightwen, 10 East, 583. The possession of a widow in right of dower is not adverse. Doe d. Hickman v. Haslewood, 1 Nev. & Perr. 352.

^b *Id.*

nephew, brought above twenty years after the death of the nephew, but within twenty years after the death of the infant; it was held, that the adverse possession began only after the latter event, and, therefore, that the action was maintainable.^a

But there can be no general occupancy of copyhold property, nor a special occupancy, but by custom, or by the designation of a special occupant in the lord's grant. Therefore, where a copyhold estate was granted to *A.* for her own life and the life of *B.*, with a grant of the reversion to *C.* for other lives, and *A.* devised the estate to *B.*, who kept possession for more than twenty years; held, that *C.*'s right of possession attached on the death of *A.*, and as no claim had been made within twenty years, an ejectment for the premises was barred by the statute of limitations.^b

*834

Where a lease for years, determinable on lives, was granted in 1732, and in 1784 the same lessor granted a similar lease of the same premises to another lessee, who always afterwards paid rent; but another person, who was in possession at the granting of the second lease, claimed to be entitled to the estate, on the ground that one of the lives in the first lease was in existence, and continued to hold it until his death in 1811; held, that he had no adverse possession to give him the freehold. Held, also, that his widow, who continued to hold after his death in the same manner until she died in 1827, had only a claim on the continuation of the estate which her husband had, and therefore acquired no right by adverse possession.^c

The payment of interest on a mortgage will prevent the statute from running against a mortgagee.^d Where *A.* mortgaged his premises in fee to *B.*, with a proviso for redemption on payment of the mortgage money on a given day; but *A.* continued in possession until his death, after which *C.*, his son and heir, and his widow, continued in possession until the death of the latter, when *C.* conveyed the premises in fee to *D.*, who levied a fine with proclamations and entered into possession. On an ejectment being brought by *E.*, the heir-at-law of *B.*, the original mortgagee, and a special verdict found as a fact the non-payment of the mortgage debt on the given day, without finding either an adverse possession by *A.* or his heir, or that interest had been paid upon the mortgage money by the mortgagor; held, that though there had been a lapse of thirty-seven years since default in payment of the principal, the statute of limitations was no bar to the ejectment, and consequently that the mortgagee was not precluded thereby; for the inference from the finding of the jury was, that the occupation

Possession of mortgaged property, payment of interest.

^a Doe d. Colclough v. Hulse, 5 D. & R. 659. 3 B. & C. 757. (10 Eng. C. L. 224.)

^b Doe d. Foster v. Scott, 7 D. & R. 190. 4 B. & C. 706. (10 Eng. C. L. 443.)

^c Rex v. Axbridge, 1 Harr. & Woll. 74. 4 N. & M. 477. (29 Eng. C. L. 160.)

^d Hatcher v. Fineux, Lord Raym. 740.

must have *been with the consent of the mortgagee, and consequently that the possession could not be adverse.*

So where an estate was contracted to be sold, and the vendee paid part of the purchase-money, and entered into possession without a conveyance, paying interest on the remainder of the purchase-money from time to time; held, that his possession was not adverse, and that, after twenty years, an ejectment might be brought; for the payment of interest was evidence to show that he remained in possession by the owner's permission.^b

Possession of the *cestui que trust*.

The *cestui que trust* is considered as tenant at will to the trustee;^c therefore the possession of the former is not adverse to the title of the latter.^d(1) Where the rents, issues, and profits of a trust estate were received by the *cestui que trust* for more than twenty years after the creation of the trust, without any interference of the trustees, such possession, &c, being consistent with, and secured to the *cestui que trust* by the terms of the trust-deed, the receipt was held not to be adverse to the title of the trustees, so as to bar their ejectment against the grantees of the *cestui que trust* brought after the twenty years.* Indeed it is said that the statute will never operate between trustee and *cestui que trust*, except in very particular cases; although it seems that if a *cestui que trust* sell or devise the estate and the vendee or devisee obtain possession of the title-deeds and enter, and do no act recognising the trustee's title, the statute will operate from the time of such entry.^f

Encroachment upon waste lands.

It was formerly considered doubtful whether an encroachment upon the waste adjoining to the demised premises by a lessee, and uninterrupted possession thereof by him for twenty years, should give him a possessory right thereto, or whether he should be deemed to have enclosed the waste, in right of the demised premises for the benefit of the lessor after the expiration *of the term.* But it appears from modern decisions, that such an encroachment would be for the benefit of his landlord, unless it appear clearly from some act done at the time, that the tenant intended to make the encroachment for his own

* Hall v. Doe d. Surtees, 1 D. & R. 340. 5 B. & A. 687. (7 Eng. C. L. 232.)

Doë d. Milburn v. Edgar, 1 Hodges, 437. 2 Bing. N. C. 496. (29 Eng. C. L. 402.)

* Gree v. Rolle, Lord Raym. 716.

* Smith d. Dennison v. King, 16 East, 283.

* Keane d. Lord Byron v. Deardon, 8 East, 248.

* Sugden's Vendors & Purchasers, 241. Adams, 51.

* Doe d. Colclough v. Mulliner, 1 Esp. 460. Cressh v. Willmot, 2 Taunt. 160, (in notis.) Doe d. Challnor v. Davies, 1 Esp. 461. Bryan d. Child v. Winwood, 1 Taunt. 206.

(1) (Nor is the possession of the trustee adverse to the *cestui que trust*. In general, the statute of limitations has no operation in cases of fraud or trust, as it takes effect only from the discovery of the fraud and the cesser of the trust. Wiener v. Ogden, 4 Wash. C. C. Rep. 631. Walker v. Walker, 16 Serg. & R. 319. Lyon v. Marclay, 1 Watts, 275. Rush v. Burr, 1 Watts, 120. Comegys v. Carley, 3 Watts, 280. Green v. Johnson, 3 Gill & Johns. 389. Payne v. Hathaway, 3 Verm. 212.)

benefit, and not to hold it as he held the farm.^a *Prima facie*, every inclosure made by a tenant adjoining the demised premises is presumed to be made by him for the benefit of the landlord; but this presumption may be rebutted by evidence. If a lessee inclose land which is near the demised premises, as being part of the premises comprised in his lease, this is not an adverse possession against his landlord; and a twenty years' possession by him will not enable him to retain possession of the inclosed land against his landlord.^b Such possession, however, will be adverse to the rights of the commoners; and to the lord himself, except as landlord, at the expiration of the lease.^c

Though twenty years' possession will give a good title against the lord, if it be taken and held in defiance of him, yet if it be originally taken by his permission, or if at any subsequent period, an acknowledgement had been made (though it were one hundred years since) that the premises had been occupied by his permission, the statute will not run against him, for the possession of a tenant at will, for ever so many years is no disseisin.^d Therefore, where a cottager occupied a piece of land inclosed from the waste on the side of a turnpike road for more than thirty years, without paying rent, and at the end of that time paid sixpence rent on four several occasions to the owners of the adjoining land; held, that this was conclusive evidence of a permissive occupation only, so as to maintain ejectment.^e So, where a cottage standing in the corner of a meadow, (belonging to the lord of the manor,) but separated from it and from a high road by a hedge, had been occupied for about *twenty years without any payment of rent; the lord then demanded possession, which was reluctantly given, and the occupier was told that if he were allowed to resume possession it would only be during pleasure; he did resume and kept possession for fifteen years more and never paid any rent; held, that the possession was not necessarily adverse, and that the jury were warranted in presuming that it had commenced by the permission of the lord.^f

A permissive possession of waste lands cannot be deemed adverse.

*837

Where an inclosure of waste lands had been made on a manor belonging to the crown, which was held for twenty-three years without payment of rent or other acknowledgement; the manor was sold in fee by certain commissioners, by virtue of 57 Geo. III, c. 97, to the lessor of the plaintiff, who brought an ejectment to recover the inclosure; held, that he was not entitled to recover, for after twenty years' adverse possession the defendant was protected even against the crown

Adverse possession against the crown.

^a Doe d. Lewis v. Rees, 6 C. & P. 610. (25 Eng. C. L. 561.) Parke.

^b Doe d. Dunraven v. Williams, 7 C. & P. 332. (32 Eng. C. L.) Coleridge.

^c Creach v. Wilmot, 2 Taunt. 160, (in notis.)

^d B. N. P. 104.

^e Doe d. Jackson v. Wilkinson, 5 D. & R. 273. 3 B. & C. 413. (10 Eng. C. L. 135.)

^f Doe d. Thompson v. Clark, 8 B. & C. 717. (15 Eng. C. L. 331.)

itself, until a judgment in intrusion; and the lessor of the plaintiff could not be in a better, or in a more favorable condition, than the crown.^a

When adverse possession will be negatived.

Actual ouster by a co-tenant

*838

Levying a fine.

Feoffment

Adverse possession will also be negatived whenever the party claiming has never in contemplation of law been out of possession. Formerly the possession of one joint tenant, parcener, or tenant in common, was *prima facie* the possession of his companion; therefore the possession of one could not be considered as adverse to the title of the other;^b unless it was attended with circumstances indicative of an adverse intent, or from which an actual ouster might be inferred; thus, thirty-six years sole and uninterrupted possession by one tenant in common, without any account to, or demand made, or claim set up, by his companion, was held a sufficient ground for a jury to presume an actual ouster of the co-tenant.^c So where upon demand by the co-tenant of his moiety, the other refused to pay, and denied his title, saying he claimed the whole and *would not pay, and continued in possession, such possession was deemed adverse, and ouster enough.^d And in like manner, where there were two joint tenants of a lease for years, and one bade the other go out of the house, and he went out accordingly, this was held to be an actual ouster.^e

Upon the same principle, although the entry of one was, generally speaking, the entry of both, yet if he enter *claiming the whole* to himself, it would be an entry adverse to his companion.^f But where there was no circumstance to induce a supposition of an actual ouster, but a bare perception of the profits by one tenant in common for twenty-six years, the possession was held not to be adverse.^g And where a tenant in common levied a fine of the whole premises, and afterwards took all the rents and profits for four or five years, but it did not appear that he held adversely at the time of levying the fine, it was held that such fine and receipt were not sufficient evidence of an ouster of his companion.^h But where there were several coparceners, and one who was in actual possession executed a feoffment to a stranger of the whole premises; it was held to oust the other coparceners.ⁱ Where an estate descended to parceners, one of whom was under a disability,

^a Doe d. Wall (or Watt) v. Morris, 2 Scott, 276. (29 Eng. C. L. 304.) 1 Hodges, 215.

^b Ford v. Grey, Salk. 285. Doe d. Barnet v. Keen, 7 T. R. 386. Taylor v. Fisher, Loft. 766. But see 3 & 4 W. IV, c. 27, s. 12, *post*.

^c Doe d. Fisher v. Prosser, Cowp. 217.

^d *Id.* Doe d. Hellings, v. Bird, 11 East, 49.

^e Vin. Abr. 14, 512.

^f *Id.* Adams, 55. But in the absence of evidence to the contrary, the entry of one coparcener would be presumed to have been a general entry, not for himself alone, but for all who had a right. Doe d. Reed v. Taylor, 5 B. & Ad. 575. (27 Eng. C. L. 126.)

^g Fairclain d. Fowler v. Shackleton, 5 Burr. 2604.

^h Peaceable d. Hornblower v. Read, 1 East, 568.

ⁱ Doe d. Reed v. Taylor, 5 B. & Ad. 575. (27 Eng. C. L. 126.)

which continued more than twenty years, and the other did not enter within twenty years, the disability of the one did not preserve the title of the other after the twenty years elapsed.^a

But now by 3 & 4 W. IV, c. 27. s. 12, "when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons, other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last mentioned person or persons, or any of them."^b

Where the possessor acknowledges the title of the claimant, there can be no adverse possession; as where *J. S.* demised lands to the rector of *D.* for forty years at a certain rent; in the lease, the rector after covenanting for payment of the rent further granted to *J. S.* the tithe of oats of the parish of *D.*; the lease also contained a proviso for re-entry, in case the rent should be in arrear, or *J. S.*, his heirs, &c., should be disturbed by the rector or his assigns in the receipt of the tithe, and concluded with a covenant on the part of *J. S.*, that the rector should quietly enjoy the lands under the covenants, grants, and agreements contained in the lease; after the expiration of the lease, the rector continued to hold the land, but withheld the rent for more than twenty years; the heirs of *J. S.* at the same time continuing to take the tithe of oats, and some confusion existing as to the respective rights of the rector and the heirs of *J. S.*, the latter being portionists of the tithes of the parish; held, that the possession of the land by the lessee, was not adverse so as to let in the operation of the statute of limitations.^c

The possession of one coparcener, joint tenant, or tenant in common, not to be deemed the possession of his companion. *839

When the possessor acknowledges the title of the claimant, his possession is not adverse.

^a *Roe d. Langdon v. Rowleston*, 2 Taunt. 441.

^b 3 & 4 W. IV, c. 27. s. 12.

^c *Roe d. Pellatt v. Ferrars*, 3 B. & P. 542.

*SECTION VI.

WHO MAY BRING EJECTMENT.

	PAGE		PAGE
1. A mortgagee.		9. Devises.	845
2. The lord of the manor.	841	10. Persons who have had adverse possession for twenty years.	845
3. A copyholder.	842	11. Corporations.	846
4. A widow for her free bench.	843	12. Parsons.	847
5. A guardian.	843	13. Trustees.	848
6. An assignee.	843		
7. Tenant by eligit.	844		
8. Personal representative.	845		

HAVING thus treated of the nature of the title which will sustain an action of ejectment, it is proposed to consider next, the persons who by reason of their estate and interest in the lands are entitled to bring this action; always bearing in mind, that a right of entry or possession must accompany their legal title.

A tenant for years, for life, in tail or in fee, may maintain ejectment.*

When the mortgagee may bring ejectment.

- 1.—*A mortgagee.*] A mortgagee may maintain this action against the mortgagor, if in possession after the mortgage has been forfeited, without giving notice to quit;^a or against any person claiming under a lease granted by the mortgagor, subsequent to the mortgage, and without the privity of the mortgagee;^c or against a yearly tenant of the mortgagor;^d but he cannot eject a tenant in possession under a lease granted *previous* to the mortgage.⁽¹⁾ Where the attorney of the mortgagee applied to the tenant in possession for rent to pay the interest of the mortgage, and threatened to distrain, it was held that the mortgagee thereby recognised the possession as legal, and that he could not maintain ejectment on a demise made **previous* to such application;^f yet the mere fact of the mortgagee having received interest down to a day later than the day of the demise, has been held not to amount to a recognition that the mortgagor was in lawful possession till the time

* Adams, 59. *Goodright d. Hare v. Cator*, Doug. 477.

^b Doe d. Fisher v. Giles, 5 Bing. 421. (15 Eng. C. L. 485.) 2 M. & P. 749.

^c Keech d. Warne v. Hall, Doug. 21.

^d Thunder d. Weaver v. Belcher, 3 East, 449.

^e Doe d. Da Costa v. Wharton, 8 T. R. 2. Moss v. Gallimore, 1 Doug. 279.

^f Doe d. Whittaker v. Hales, 7 Bing. 322. (20 Eng. C. L. 147.) In Doe v. Cadwallader, *infra*, Littledale J., doubted the propriety of this decision.

(1) (*Rogers v. Eagle Fire Co.*, 9 Wend. 611. *Jackson v. Marsh*, 5 Wend. 44. *Phyfe v. Riley*, 15 Wend. 245. *Middletown Bank v. Bates*, 11 Conn. 519. *Lessee of Ely v. McGuire*, 1 Ohio, 372. *Reed v. Shepley*, 6 Verm. 602. *Den v. Stockton*, 7 Halst. 222. *Knaub v. Essock*, 2 Watts, 262.)

when such interest was paid, and consequently was no defence; it was distinguishable from the preceding case, inasmuch as receiving the interest did not recognise the defendant as a person in lawful possession; whereas in the former case the plaintiff by his agent recognised the defendant being in lawful possession.^a

The assignee of the mortgagee may maintain ejectment.^b So a second mortgagee, who takes an assignment of a term to attend the inheritance, and has all the title-deeds, may recover in ejectment against the first mortgagee, not having had notice of such prior mortgage.^c

2.—*The lord of the manor.*] The lord of the manor may maintain ejectment when the tenant commits a forfeiture;^d and his right to maintain ejectment against his copyholder for a forfeiture by committing waste, will not be taken away by an intermediate estate in remainder between the life estate of the copyholder and the lord's reversion; for if it were, the tenant for life, and remainder-man, by combining together, might strip the estate of all the timber.^e But to entitle the lord to maintain ejectment for forfeiture by committing waste, there must be damage done to the estate; therefore, where in ejectment by the lord against the copyholder for pulling down a barn without any intention of rebuilding it, the jury found that the premises were not thereby damaged; it was held that the *plaintiff was not entitled to recover.^f Where an inclosure was made from the waste for twelve or thirteen years, and seen by the steward of the same lord from time to time without objection made; held that it might be presumed by the jury to have been made by the license of the lord and that an ejectment could not be maintained by him against the tenant without a previous notice to throw it up.^g

The lord of the manor may bring ejectment.

*842

3.—*A copyholder.*] A copyholder may maintain ejectment to recover possession if wrongfully ejected by the lord, or he may bring this action against his lessee.^h If he claims by descent as *heir*, he may maintain ejectment without admittance as his title is complete against all the world except the lord, immediately upon the death of the ancestor.ⁱ But if the lord

When a copyholder may bring ejectment.

^a Doe d. Rogers v. Cadwallader, 2 B. & Ad. 473. (22 Eng. C. L. 126.)

^b Smartle v. Williams, 1 Salk. 245.

^c Goodtitle d. Norris v. Morgan, 1 T. R. 755.

^d Doe d. Tarrant v. Hellier, 3 T. R. 162. A copyholder, who has done fealty, and attorned tenant to the lord of a manor, cannot, in ejectment, impeach the lord's title, by setting up the right of a third person, unless the latter joins in resisting the title of the lessor of the plaintiff. Doe d. Nepean (Bart.) v. Budden, 1 D. & R. 243. S. C. 5 B. & A. 626. (7 Eng. C. L. 214.)

^e Doe d. Folkes v. Clements, 2 M. & S. 68.

^f Doe d. Grubb v. Burlington, (Earl of,) 5 B. & Ad. 507. (37 Eng. C. L. 117.)

^g Doe d. Foley v. Wilson, 11 East, 56.

^h Adams, 63. See Goodwin v. Longhurst, Cro. Eliz. 535.

ⁱ R. v. Bennett, 2 T. R. 197.

seize the land upon the death of the ancestor, the heir, to support an ejectment, must show that he has tendered himself to be admitted, or that the lord has done some act dispensing with such tender.^a Where the lord of a manor, by copy of court roll, granted to *A.* the reversion of certain premises then in his tenure, to have and to hold to *B.* for his life, immediately after the death of *A.*; held, that *B.* might, on the death of *A.* maintain an ejectment, although he had never been admitted, he having acquired a perfect legal title by the grant, without admittance.^b

**Surrender-
derree.**

The surrenderee of a copyholder cannot bring ejectment until after admittance, for the legal estate does not vest in him before that event.^c But when once admitted, the title relates
***843** *back from the time of the admittance to the surrender, as against all persons by the lord; therefore a surrenderee may maintain ejectment against the surrenderor on a demise laid between the times of surrender and admittance, provided the admittance be made before the day of the trial.^d

**Devisee of
a copy-
hold.**

The devisee of a copyhold or customary estate, which had been surrendered to the use of the will, having died before admittance, it was held, that her devisee, though afterwards admitted, could not recover in ejectment, for his admittance had no relation to the last legal surrender, but the legal title remained in the heir of the surrenderor.^e

**Widows
entitled to
free bench
or dower.**

4.—*A widow for her "free bench."*] A widow may maintain ejectment for her "*free bench*," without admittance; for it is an excrescence which by the custom and the law grows out of the estate.^f But not for her dower before assignment.^g

Guardians

5.—*A guardian.*] Guardian in *socage*^h or *testamentary* guardian appointed under 12 Car. II, c. 24, s. 8, may maintain ejectment.ⁱ But a guardian for *nurture* cannot, for he has the care of the infant only, and has nothing to do with the land.^j

^a Doe d. Burrell v. Bellamy, 3 M. & S. 87.

^b Roe d. Cosh v. Lovelass, 2 B. & A. 453.

^c Roe d. Jeffereys v. Hicks, 2 Wils. 13. A surrender of chambers in New Inn, to the treasurer and ancients of the society, made with their assent, to the intent that they may grant the said chambers to a purchaser, passes the estate to such purchaser, before admission; for admission in this case is not necessary as in the case of copyholds to complete the grantee's estate, but it is only for the purpose of signifying the assent of the society that the grantee should become a member of the Inn. Doe d. Warry v. Miller, 1 T. R. 393.

^d Holdfast d. Woolthams v. Clapham, 1 T. R. 600. Doe d. Bennington v. Hall, 16 East, 208.

^e Doe d. Vernon v. Vernon, 7 East, 8. 3 Smith, 6. Doe d. Burrough v. Reade, 8 East, 353.

^f Adams, 66. Godwin v. Longhurst, Cro. Eliz. 535.

^g Doe d. Nutt v. Nutt, 2 C. & P. 430. (12 Eng. C. L. 205.)

^h Wade v. Cole, 1 Lord Raym. 130.

ⁱ Id. Bedell v. Constable, Vaugh. 177. Doe d. Parry v. Hodges, 2 Wils. 129.

^j Ratcliff's Case, 3 Co. 37.

An infant may maintain this action, but he must name a *Infant* good plaintiff, who will be answerable for the costs.*

6.—*An assignee.*] The assignee of a bankrupt may maintain ejectment.^b So may the assignee of an insolvent debtor; for all the estate of the debtor is vested in the assignee by the assignment, and he has the same remedies in respect thereof which the debtor himself had.*

The assignee of a bankrupt or insolvent debtor.

*844

7.—*Tenant by elegit.*] A tenant by elegit may maintain ejectment in order to gain actual possession.^c A plaintiff who claims under an *elegit* subsequent to a lease granted to the tenant in possession, cannot recover in ejectment, though he give the tenant notice that he does not mean to disturb his possession, only wishing to get into the receipt of the rents and profits of the estate, because, the lessee's title being prior in point of time, the legal estate was in him.^e But where the possession of the tenant was subsequent to the date of the judgment, although prior to the issuing of the writ of *elegit*, the title of the tenant by *elegit* was not thereby barred.^f

Tenant by elegit.

If at the time of the *elegit* the debtor is entitled to the whole property sought to be recovered by the *elegit* creditor, it is incumbent on other parties in possession, as under-tenants or otherwise, when the ejectment is brought to prove their title or the *elegit* creditor will be entitled to judgment against all.^g In ejectment for lands, the lease of which had been taken in execution under a *fi. fa.* against the termor, it was held, that the lessor of the plaintiff, who was plaintiff in a former action, and to whom the sheriff had assigned the lease, was bound to prove not only the *fi. fa.* but also the judgment.^h

If the sheriff sell a term under a writ of *fi. fa.*, which is afterwards set aside for irregularity, and the produce of the sale directed to be returned to the termor, the termor cannot maintain ejectment to recover his term against the vendee under the

Fi. fa.

* *Zouch v. Parsons*, 3 Burr. 1794. *Noke v. Windham*, Stra. 694. *Madden d. Baker v. White*, 2 T. R. 159.

^b See *ante*, 282 and title "Bankruptcy."

^c 7 Geo. IV, c. 57, ss. 11, 19, 20, 24. *Doe d. Brenan v. Glenfield*, 1 Bing. N. C. 729. (27 Eng. C. L. 559.) 1 Hodges, 78. *Doe d. Clarke v. Spencer*, 3 Bing. 203, (11 Eng. C. L. 99,) *id.* 370. (13 Eng. C. L. 12.) *Doe d. Palmer v. Andrews*, 4 Bing. 348. (13 Eng. C. L. 466.)

^d *Lowthal v. Tomkins*, 2 Equit. Cas. A. 380. *Taylor v. Cole*, 3 T. R. 295. *Denn d. Taylor v. Abingdon*, Doug. 473. In *Rogers v. Pitcher*, 6 Taunt. 204, (1 Eng. C. L. 357.) Gibbs, C. J., doubted whether it was necessary for a tenant by *elegit* to bring ejectment in order to obtain possession.

^e *Doe d. Da Costa v. Wharton*, 8 T. R. 2.

^f *Doe d. Putland v. Hilder*, 2 B. & A. 782.

^g *Doe d. Evans v. Owen*, 2 C. & J. 71. 2 Tyr. 149.

^h *Doe v. Smith*, 2 Stark. 199. (3 Eng. C. L. 312.) But if he had not been plaintiff in the former action it would be sufficient to prove the *fi. fa.* *Doe v. Murless*, 6 M. & S. 110.

sheriff; for the property passed by the sale, and the termor should not have the price of the term and the term also.

Personal
represent-
atives.

8.—*Personal representatives.*] Personal representatives may maintain this action for lands which the deceased held for a term of years;^b or even for estates held *pur autre vie* where there is no special occupant;^c but not for copyholds; therefore, it has been held, that an executor may lay a demise in ejectment before probate granted.^d One who was admitted tenant, upon a claim as administrator *de bonis non* to the grantee of a copyhold *pur autre vie*, having no title in such character, could not recover in ejectment by virtue of such admission, as upon a new and substantive grant of the lord.^e

Devises
and lega-
tees.

9.—*Devises.*] The devisee of a freehold interest may immediately maintain ejectment for the lands demised.^f But if the bequest be a term of years, he does not acquire the legal title until he has obtained the assent of the executors thereto; after which (the legal estate being thereby absolutely vested in him,) he may maintain this action.^g The devisee of copyhold cannot bring ejectment before admittance.^h The assignee of the reversion upon a right of re-entry upon condition broken may maintain ejectment.ⁱ

Assignees
of the re-
version.

Persons
having ad-
verse pos-
session for
twenty
years have
a sufficient
title to
maintain
ejectment.
*846

10.—*Persons who have had adverse possession for twenty years.*] A party having adverse possession for twenty years may maintain *ejectment against any person who ousts him after that period;^j unless such possession be affected by the provisions of the second section of the statute of limitations.^k He may maintain this action even against the legal owner of the lands although the latter enter peaceably, after the premises were deserted by such adverse possessor.^l Where the plaintiff in ejectment proved twenty years' possession, and the defendant proved that he had been subsequently in possession for

* Doe d. Emmett v. Thorn, 1 M. & S. 425.

^b 4 Ed. III, c. 7. Doe d. Shore v. Porter, 3 T. R. 13. See 3 & 4 W. IV, c. 27, s. 6, post.

^c 29 Car. II, c. 3, s. 12.

^d Roe d. Bendall v. Summerset, 2 Bl. 694.

^e Zouche d. Forse v. Forse, 7 East, 186. 3 Smith, 191.

^f Co. Litt. 240, b. Adams, 71. Where the devisee of an estate refused to take it, saying she was entitled as heir at law, and would not accept any benefit by the will of the devisor; held, that this was not such a disclaimer as prevented her from afterwards bringing ejectment, and relying on her title as devisee. Doe d. Smyth v. Smyth, 6 B. & C. 112. (13 Eng. C. L. 311.) 9 D. & R. 136.

^g Young v. Holmes, Stra. 70. Doe d. Lord Say & Sele v. Guy, 3 East, 120. Where A. devised the residue of a term to B., and A.'s administrator paid the rent reserved for six years, and charged it to B.; held to be evidence of his assent to the bequest to enable B. to maintain ejectment. Doe v. Maberley, 6 C. & P. 126. (25 Eng. C. L. 313.) Tindal.

^h Roe v. Hicks, 2 Wils. 15.

ⁱ 32 Hen. VIII, c. 34.

^j Stocker v. Barney, Lord Raym. 741.

^k Ante, 796.

^l Doe d. Borough v. Reed, 8 East, 358.

ten years; it was held, that the lessor of the plaintiff was entitled to recover unless the defendant showed a better title.^a

But if the premises belong to the church or the crown, it will be a good defence to an action by a party who founds his claim on twenty years' possession; though a grant will be presumed from the crown after twenty years where it is capable of making such grant; but if there be no grant, or if the crown have no capacity to make a grant, no possession for less than sixty years will be sufficient to support ejectment.^b Mere possession is sufficient to support ejectment against a wrong-doer; as where the plaintiff proved possession for a year under a lease, and the defendant came at night and forcibly turned the tenant out, it was held sufficient without further evidence of title.^c(1)

A person in possession for a year.

11.—*Corporations.*] Corporations aggregate or sole may maintain ejectment,^d and churchwardens and overseers are deemed a corporate body for purposes relating to parish lands.^e Where a pauper had been put in possession of a cottage forty years ago, by the then existing overseers of the poor, and had continued in the parish pay, and the cottage had been from time to time repaired by different overseers till two years ago, when the pauper disposed of it to the defendant, and went away; held, that the existing overseers could not maintain ejectment for it, "having no derivative title as a corporation from their predecessors, so as to connect themselves in interest with the overseers by whom the pauper was put in possession, and the pauper having done no act to recognise his holding under the demising set of overseers."^f

*347

Churchwardens alone, *without overseers*, are not a corporation within the 55 Geo. III, c. 12, s. 17, and therefore have no title to the land.^g But that statute vests in the churchwardens and overseers all buildings, lands and hereditaments belonging to the parish, not merely where the profits thereof are applicable to the relief of the poor, but where they are applicable to those purposes for which church-rates are levied, even though such lands had originally been vested in trustees for the benefit of the parish;^h and payment of rent to parish officers in their character as such, is evidence to show that the premises for which it was paid belonged to the parish within the provisions of the above statute, so as to enable the parish officers for the

Churchwardens and overseers.

^a Doe d. Hardinge v. Cooke, 7 Bing. 346. (20 Eng. C. L. 156.) 5 M. & P. 181.

^b Goodtitle d. Parker v. Baldwin, 11 East, 488.

^c Doe d. Hughes v. Dyball, M. & M. 346. 3 C. & P. 610. (14 Eng. C. L. 481.)

^d Adams, 78. Runnington, 179.

^e Id. 55 Geo. III, c. 12, s. 17.

^f Doe d. Grundy v. Clarke, 14 East, 488.

^g Phillips v. Pearce, 5 B. & C. 433. (11 Eng. C. L. 264.)

^h Doe d. Jackson v. Hiley, 10 B. & C. 585. (21 Eng. C. L. 192.)

(1) (*Jackson v. Oliz*, 8 Wend. 440. *Day v. Alverson*, 9 Wend. 223. *Sigler v. Van Riper*, 10 Wend. 414. *Whitney v. Wright*, 15 Wend. 171. *Abram's Lessee v. Will*, 6 Ohio, 165. *Warner's Adm. v. Page*, 4 Verm. 291. *Reed v. Shepley*, 6 Verm. 602.)

time being to maintain ejectment against the party so paying rent, who held under a lease granted by the parish officers previous to the statute, and therefore void; for they had no right to demise the lands before the statute.^a

Rectors and vicars 12.—*Parsons.*] The rector or vicar may maintain ejectment for tithes.^b But this action can only be maintained against persons claiming or pretending to have title thereto, and not against such persons as refuse to set them out;^c nor will it lie where there is a composition in lieu of tithes;^d nor will it lie for glebe-land after sequestration.^e

Grantee of a rent-charge. The grantee of a rent-charge may maintain ejectment, if power be reserved to him by the deed to enter upon the lands in case the annuity be in arrear, and hold them until satisfaction;^f *and he need not make a demand under such circumstances before he brings his action.^g But these rights of entry are always taken strictly.^h

When trustees may maintain ejectment. 13.—*Trustees.*] Trustees may maintain ejectment whenever the trusts are not executed by the statute of uses, for until that event the legal estate vests in them; and we have seen that the plaintiff in ejectment must have the legal title. Though not strictly within the scope of this work, it may not be amiss to introduce a few leading cases in which the trustees have been held to take and not take the legal estate.

When the legal estate will vest in trustees. A devise to a person in trust to pay over the rents and profits to another, will vest the legal estate in the trustee.ⁱ It is said, however, that some other act is necessary besides the receipt of the rents and paying them over, in order to vest the legal estate in the trustee; but though it has happened in all the cases that the trustees should be required to do some other acts, as well as to pay the rents and profits, yet that doctrine has not been laid down by any of the courts.^j

A devise in trust to *permit some other person to receive* the rents and profits, will vest the legal estate in the *cestui que trust*, unless it be necessary for the purposes of the trust that the trustees should take the legal estate.^k Thus, a devise of lands to trustees and their heirs upon trust to permit a *feme*

^a Doe d. Higgs v. Terry, 4 Ad. & Ell. 274. (31 Eng. C. L. —) 5 N. & M. 556. 1 H. & W. 547.

^b Cam. v. Clavering, Lord Raym. 789.

^c 2 & 3 Ed. VI, c. 13. s. 13.

^d Dyer 116. b. Adams, 81.

^e Doe d. Morgan v. Bluck, 3 Camp. 447. ^f Jemott v. Cowley, 1 Saund. 112.

^g Doe d. Biass v. Horsley, 1 Ad. & Ell. 766. (28 Eng. C. L. 201.) 3 N. & M. 567. Pierson v. Sorrel, 2 Show. 183. 3 Dyer, 348.

^h Haswell d. Hodson v. Gowthwaite, Willes, 500.

ⁱ Shep. Touch. 482. Shapland v. Smith, Brown. Chan. Cas. 75. Silvester d. Law v. Wilson, 2 T. R. 444. Jones v. Lord Say and Sele, 3 Vin. Ab. 262. Broughton v. Langley, Salk. 679. Burchett v. Durdont, 2 Vent. 311. Doe d. Booth v. Field, 2 B. & Ad. 564. (22 Eng. C. L. 142.)

^j Adams, 82.

^k *Id.* Doe d. Leicester v. Biggs, 2 Taunt. 109, *post*, 850.

covert to receive and take the rents and profits during her life, for her sole and separate use, and after her decease to the use of the first and other sons of her body, then to the daughters as tenants in common, with other like limitations to other *femes covert*, was held to vest the legal estate in the trustees.^a

So, where there was a devise to *A.* in trust to permit and *suffer the testator's widow to have, hold, use, occupy, possess, *849 and enjoy the full, free, and uninterrupted possession and use of all interests of moneys in the funds, and rents and profits arising from the testator's houses, for her natural life, if she should remain unmarried, and that her receipts for all rents, &c., with the approbation of any one of his trustees, should be good and valid, she providing for and educating properly the testator's children, and also paying two annuities thereby bequeathed to *M. D.* and *M. I.* of 20*l.* for their lives, besides board and lodging to *M. I.*, and that his children should be solely under their mother's direction until marriage, or properly provided for; it was held that the use was executed in the devisees in trust, upon the ground that the testator's having made the approbation of the trustees necessary to the widow's receipts, showed that he did not intend to give her the legal estate.^b

And where lands were conveyed to trustees and their heirs, in trust that the trustees should, with the consent of *A.*, sell the inheritance in fee, and apply the purchase-money to certain trusts mentioned in the deed, with a proviso, that the rents, issues, and profits, until the sale of the inheritance, should be *received by such person, and for such uses*, as they would have been, if the deed had not been made; it was held, notwithstanding the proviso, that the estate was executed in the trustees immediately.^c

So, where the testator devised to trustees and their heirs certain premises described in his will, upon trust to permit his daughter to enjoy the same and take the rents and profits during her life, exclusive of her husband, &c., and after devising several other lands to the trustees in like terms, he concluded thus, "And I hereby will that the said trustees and each of them shall, may, and do in every respect give receipts, pay money, and devise the aforesaid premises, or any part thereof, as shall be consistent with their duty and trust or otherwise:" held, that the trustees took a fee-simple in the land; for if leases made in pursuance of the direction contained in the *last clause, would take effect out of the estate of the trustees they must take the fee; and the language used seemed *850 evidently intended to authorise any lease that would not be considered in a court of equity as a violation of the duty of a trustee.^d

^a *Harton v. Harton*, 7 T. R. 652.

^b *Gregory v. Henderson*, 4 Taunt. 772.

^c *Keen d. Lord Byron v. Deardon*, 8 East, 248.

^d *Doe d. Keen v. Walbank*, 2 B. & Ad. 554. (23 Eng. C. L. 139.)

Where the devise was, that the trustee *should pay unto*, or else, *permit and suffer* the testator's niece to receive the rents, the legal estate was held to be in the niece, because the words "to permit and suffer" came last; and in a will, the last words prevail, though in a deed the first.*

But where a testator devised his freehold estates to trustees upon trust, as to three undivided fourth parts, "to *pay to or permit and suffer*" his wife and daughters to receive "the *clear* yearly rents and profits," and as to the other undivided fourth part "to *pay to or permit and suffer*" his son to receive "the *clear* yearly rents and profits;" and further directed that the shares of his wife and daughters should be for their sole and separate use, and that the trustees should let the estates upon certain conditions, and out of the rents *should pay all taxes and for repairs*; held, that the legal estate in the whole of the premises vested in the trustees.^b The court distinguished this from the preceding case, inasmuch as in this case the devise was to receive the *clear* yearly rents and profits, &c., and the trustees had duties imposed upon them, such as to repair, pay taxes, &c.; besides, the trustees were empowered to let the estates.

So, where there was devise of freehold, copyhold, and leasehold estates, and all other the testator's real and personal estates unto trustees, their heirs, executors, administrators, and assigns, and to the heirs, executors, administrators, and assigns of the survivor, upon trust to pay and apply, *or permit and suffer M.* to take the rents and profits for her absolute use for life, and after her decease, upon trust for *A., B., and C.*, and their lawful issue respectively, in tail general, with benefit of survivorship, to and amongst their issue respectively as tenants in common, *851 "such issue not to have a vested interest till twenty-one, and the said trustees, after the death of *A., B., and C.*, or either of them to apply the whole or any part of the rents and profits of the trust estates, not exceeding the presumptive share of each child, towards his or her maintenance during minority; held, that the trustees took an estate in fee in the freehold and copyholds, and an absolute interest in the leaseholds.*

But where *A.* devised thus: "as to my real and personal estate, subject to my debts and funeral expenses, I give and devise the same as follows, viz., my real estate and all my personal estate unto *F. M.* and *O. W.* and their heirs, on the following trusts, viz., to the intent that they dispose of my personal estate in discharge of my debts, funeral expenses, and such legacies as I may direct; and as to my real estates, subject to my debts, and such charges as I may make, I give and devise the same to *R. P.* for life; held, that under this devise the

* *Doe d. Leicester v. Biggs*, 2 Taunt. 109. See also *Doe d. Woodcock v. Barthrop*, 5 Taunt. 352. (1 Eng. C. L. 136.)

* *White v. Parker*, 1 Hodges, 119. 1 Bing N. C. 574. (37 Eng. C. L. 493.)

* *Cursham v. Newland*, 1 Hodges, 278. 2 Bing N. C. 64. (29 Eng. C. L. 257.)

legal estate in the realty vested in *R. P.* for his life, and that *F. M.* and *O. W.* took no estate therein; because the intention that the trustees should pay the debts was not apparent on the face of the will, and therefore there was no reason for giving the real estate to them.^a

When an estate is given to trustees and their heirs indefinitely, they will take the fee, if the purposes of the trust require that they should have the absolute property in them, or that they should take it for an indefinite period of time, unless a contrary intent is manifested on the face of the will. Therefore where a testator devised to trustees, their heirs, and assigns, all his lands, freehold, copyhold, and leasehold, and all his personal estate in trust to pay debts, &c., and then to apply the annual income to the use of two nieces, for their lives; and after their decease, there were devises in terms so ambiguous as to make it doubtful what equitable interest the devisees took; it was held, the trustees took an estate in fee, in the freeholds and copyholds, and an absolute interest in the leaseholds.^b

*Where *C.* devised lands to a *feme covert* for her life, and then, to the intent that she or her husband should not be entitled to receive the rents of the tenant, appointed trustees to receive them, pay them over to the wife, and attend to repairs; with power to distrain, lease, &c.; by a codicil *C.* revoked the devise in the will, the trustees named therein having died, and devised the lands to other trustees, to the same intents, and in the same manner in all respects, as if the new trustees had originally been named trustees in the will; held, that the new trustees took the legal estate in the land.^c

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Devise for life, to the use of *L. D.* and *J. E.* and their heirs, in trust for *R. E. C.* for life, with a declaration that the estates were so limited, to the end that the legal estate so vested in *L. D.* and *J. E.* might support the contingent limitations; held, that the use was executed in *L. D.* and *J. E.*, who held the legal estate, and not *R. E. C.*; and that all subsequent estates were holden in trust.^d

A lease from the *cestui que trust* cannot be set up by the trustee in any case without the aid of a court of equity.^e

To obviate the inconveniences, says an able writer on this subject,^f which may at times arise when an ejectment is brought by a *cestui que trust*, the jury will in particular cases be permitted to presume, that a regular surrender has been made by the trustees of their estate; thereby clothing the *cestui que trust* with the legal title, and enabling him to recover in the action. When a surrender of their estate by the trustees will be presumed.

^a *Kenrick v. Beauchamp* (Lord), 3 B. & P. 175.

^b *Houston v. Hughes*, 6 B. & C. 403. (13 Eng. C. L. 213.) *Doe d. Tomkyns v. Willan*, 3 B. & A. 84. *Murthwaite v. Barnard*, 2 B. & C. 357. (9 Eng. C. L. 105.) 3 *Id.* 191. (10 Eng. C. L. 48.) 2 B. & B. 624. (6 Eng. C. L. 285.)

^c *Tenny d. Gibbs v. Moody*, 3 Bing. 3. (11 Eng. C. L. 4.)

^d *Harris v. Pugh*, 4 Bing. 335. (13 Eng. C. L. 459.)

^e *Baker v. Mellish*, 10 Ves. 544.

^f *Adams*, 88.

Thus a surrender will be presumed if the purposes of the trust-estate have been satisfied;^a or if the beneficial occupation of the estate by the possessor induces a supposition, that a conveyance of the legal estate has been made to the party beneficially interested; or when the trust is a plain one, and a court of equity would compel the trustees to make a conveyance.^b But this presumption will not be made if the surrender be a breach of the trust; or against the owner of the *inheritance who is interested in upholding it;^c or where the title of the party, for whom the presumption is required, is a doubtful equity only, until a court of equity has first declared in favor of the equitable title;^d nor can the presumption be made by the court, where the merits of the case would have warranted such presumption at the trial, if it appear, upon a special verdict, or special case reserved for their opinion, that the trust estate though satisfied is still in point of fact outstanding in the trustees.^e

Joint tenants, &c. Joint tenant, coparcener, or tenant in common, may maintain ejectment against his companion on an actual ouster.^f

Lunatic. The committee of a lunatic may bring ejectment in the name of the lunatic; for the committee is but as bailiff, and has no interest in the land.^g

Award. An award under a submission to arbitration will give a person a title to maintain this action; at least the defendant will be thereby precluded from disputing the title of the lessor of the plaintiff. As where the lessor of the plaintiff and the defendant in ejectment had before referred their right to the land to an arbitrator, who had awarded in favor of the lessor; held, that the award concluded the defendant from disputing the lessor's title in an action of ejectment.^h

SECTION V.

IN WHAT CASES AN ACTUAL ENTRY MUST BE MADE BEFORE EJECTMENT.

An actual entry must be made to WE have seen that originally, in order to maintain ejectment, an actual entry on the lands in dispute was necessary; and that, subsequently, when the process began to be conduct-

^a Doe d. Hodson v. Staple, 2 T. R. 684. ^b Doe d. Syburn v. Slade, 4 T. R. 682.

^c Doe d. Graham v. Scott, 11 East, 478.

^d Keene d. Lord Byron v. Deardon, 8 East, 248.

^e Goodtitle d. Jones, v. Jones, 7 T. R. 43.

^f See ante, 837.

^g Drury v. Fitch, Hutt. 16. Knipe v. Palmer, 2 Wils. 130. Cocks v. Darson, Hob. 215. See 43 G. III, c. 75.

^h Doe d. Morris v. Rosser, 3 East, 15.

ed under legal fictions, an actual entry was dispensed with.^a It is observable, however, that an *actual entry* is still required in order *to enable the claimant to support this action, whenever a fine has been levied with proclamations, under 4 Hen. VII, c. 24,^b and an entry is requisite to rebut the defendant's title; and whenever the possession is vacant. In all other cases the common consent rule to confess entry is sufficient.^c

avoid a fine with proclamations, and when the possession is vacant.

*854

An entry to avoid a fine.

An entry to avoid a fine must be made by the party who claims the land or by some one appointed by him;^d and the claimant must have a right to *enter*; for if the right of entry be taken away by the fine, he cannot recover in ejectment.^e The entry must be made *animo clamandi*.^f But if a party enters expressly to claim the premises as his own, it is not necessary for him to say what particular act adverse to his interest he means to defeat; he need not declare his object to be to avoid a fine.^g To render such entry available, the action must be commenced within one year after making the entry, and prosecuted with effect.^h

Where a tenant for life levies a fine, although it is no bar to those in remainder, yet a remainder-man must make an actual entry in order to avoid it before he can bring ejectment.ⁱ But where a tenant for life, with remainder to *R. P.* in fee, leased for her life and died in 1799, and the lessee continued in possession without paying rent, till his death, in 1805, when his son took possession, and continued without paying rent, and in 1807 levied a fine with proclamations; held, that the heir of *R. P.*, the remainder-man, might maintain ejectment against the son, without an actual entry to avoid the fine, or a notice to determine the tenancy.^j

Where the premises are vacated and wholly deserted by the *tenant and his place of residence is unknown, the old mode of proceeding in ejectment must be pursued; a lease must be sealed on the premises, an ouster actually made, and the parties to the suit must be real and not fictitious; for a declaration cannot be delivered, or an affidavit made of the delivery of it, and consequently the court cannot proceed to give judgment against the casual ejector.^k But in order to warrant proceedings as on

When the possession is vacant.
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^a *Ande*, 826.

^b As by 3 & 4 W. IV, c. 74, s. 2, fines and recoveries are abolished, and other modes of assurance substituted, the entry here referred to can only apply to fines levied previous to the 1st of November, 1834.

^c Adams, 93. *Per Lord Mansfield*, in *Goodright d. Hare v. Cater*, Doug. 477. An entry is not necessary to avoid a fine at common law without proclamations. *Jenkins d. Harris v. Pritchard*, 2 Wils. 45.

^d Co. Litt. 258. If done by a stranger, however, and the claimant afterwards assents, it will in some cases be sufficient.

^e Doe d. Odiarne v. Whitehead, Burr. 704.

^f Clarke v. Phillips, 1 Vent. 42.

^g Doe d. Jones v. Williams, 5 B. & Ad. 783. (27 Eng. C. L. 186.) 2 N. & M. 602, overruling 1 Saund. 319. F. n. 1.

^h 4 Ann. c. 16. s. 16.

ⁱ Doe d. Burrell v. Perkins, 3 M. & S. 271.

^j Doe d. Norman v. Rowe, 2 Dowl. 399.

^k *Compere v. Hicks*, 7 T. R. 433.

a vacant possession, they must be wholly deserted by the tenant, and it must appear that the claimant has been unable to find out where the tenant is to serve him with a declaration.^a

Of the
mode of
proceed-
ing when
the pos-
session is
vacant.

The manner of proceeding in these cases is as follows. *A.*, the party claiming title, must enter upon the land before the first day of the term of which the declaration is to be entitled and whilst on the premises execute a lease of them to *B.*, (any person who may accompany him,) at the same time delivering to him the possession by some one of the common modes. *C.* (some other person) must then enter upon the premises, and eject *B.* therefrom, and having done so, must remain upon them, whilst *B.* delivers to him a declaration in ejectment, founded upon the demise contained in the lease; and in all respects like the declaration in the modern proceedings, except that the parties to it are real instead of fictitious persons; *B.* being made the plaintiff, *A.* the lessor, and *C.* the defendant. To this declaration a notice must be added, signed by *B.*'s attorney, and addressed to *C.*, requiring him to appear and plead to the declaration, and informing him that if he do not, judgment will be signed against him by default. When the landlord or person claiming title, does not wish to go through this ceremony himself, he may execute a power of attorney, authorising *another to enter for him; and the proceedings are then the same as if he himself entered.^b

*856

In case of vacant possession, no person claiming title will be admitted to defend the action. Therefore, if the right to the premises be disputed, the party who seals the lease, must, in the first instance, recover the possession, and the other party must afterwards bring a common ejectment against him, to try the title.^c

In case of
proceed-
ings in an
inferior
court.

When an ejectment is brought in an inferior court, there must be an actual entry, lease, and ouster, as in the case of vacant possession; for inferior courts have not the power of framing rules for confessing lease, entry, and ouster, nor the means, if such rules were entered into, of enforcing obedience to them.^d

The defendant may remove an ejectment from an inferior to a superior court either by writ of *certiorari* or of *habeas corpus*;^e and if there be any special grounds, a *certiorari* will be granted as a matter of course,^f and when removed, the tenant

^a Adams, 199. A very little matter has been held sufficient to keep possession, such as leaving beer in a cellar, or hay in a barn, *id. n.* *Savage v. Dent*, 2 Stra. 1064. *Jones d. Griffiths v. March*, 4 T. R. 464. Where part of the property for which an ejectment was brought, consisted of three unfinished houses, which were untenanted, and there was no property in them, the court refused to allow the service of the declaration by sticking it up on the outer door, but obliged the lessor of the plaintiff to proceed as upon a vacant possession. *Doe d. Schovell (or Showell) v. Roe*, 3 Dowl. 591. 2 C. M. & R. 42.

^b Adams, 200. 2 Sell. Prac. 131.

^c *Id.* B. N. P. 96.

^d *Rex v. The Mayor of Bristow*, 1 Keb. 690. *Sherman v. Cocke*, *id.* 795.

^e *Doe d. Sadler v. Dring*, 1 B. & C. 253. (8 Eng. C. L. 69.)

^f *Patterson d. Gradbridge v. Eades*, 3 B. & C. 550. (10 Eng. C. L. 179.)

in possession is entitled to the same privilege of confessing lease, entry, and ouster, and defending the action, as if the plaintiff had originally declared in the superior court.^a

A judgment in an action of ejectment in an inferior jurisdiction, is not within the meaning of the 19 Geo. III, c. 70, s. 11; and therefore if the defendant leaves the jurisdiction, the judgment cannot be removed into a superior court.^b

*SECTION VI.

*857

NOTICE TO QUIT.

	PAGE		PAGE
1. When notice to quit must be given.		5. At what time notice should expire.	868
2. Form of the notice.	863	6. Waiver of notice.	873
3. By whom notice should be given.	865	7. When notice to quit is not required.	875
4. To whom.	867		

1.—*When notice to quit must be given.*] WHENEVER there is an existing tenancy from year to year, the landlord cannot maintain ejectment against the tenant without having given him half a year's notice, expiring with the year of the tenancy; except where a different period is established, either by an express agreement between the parties, or by a particular local custom.⁽¹⁾ A tenancy at will in the ancient acceptance of the term, i. e. a holding at the will of the owner of the land, is in modern times scarcely known, the inclination of the courts, of late, being to construe every tenancy a holding from year to year, unless a different tenancy be created by express agreement between the parties. A general occupation of land therefore, without any certain or determinable estate being limited therein, enures as a tenancy from year to year, determinable by a notice to quit.

When a party has obtained possession of premises belonging to another, and the owner does any act which implies that he intends to acknowledge him as tenant, a tenancy from year to year is created by such act, and the tenant will be entitled to regular notice to quit before he can be ejected. Thus,

^a Gilbert, Eject. 37.

^b Doe d. Stansfield v. Shipley, 2 Dowl. 408.

^c B. N. P. 96. Farker d. Walker v. Constable, 3 Wils. 25.

(1) (As to notice to quit, see *Jackson v. French*, 3 Wend. 337. *Jackson v. Salmon*, 4 Wend. 327. *Jackson v. Mouncrief*, 5 Wend. 26. *Jackson v. Burton*, 1 Wend. 341. *Tuttle v. Reynolds*, 1 Verm. 80. *Hanckel v. Whitney*, Ibid. 311. *Clapp v. Beardsley*, Ibid. 151. *Catlin v. Washburn*, 3 Verm. 25. *Den v. Depue*, 6 Halst. 409. *Den v. Adams*, 7 Halst. 99. *Den v. Stockton*. Ibid. 322.)

if a person enters into an agreement for a lease, and is let into possession, and has paid the stipulated rent, he is a tenant from year to year.^a So where a party entered into possession of premises under an agreement for a lease at a stipulated rent, and occupied them more than a year, but paid no rent; the landlord afterwards delivered to him an account, charging him with half a year's rent, which he admitted to be due, and named the amount; held, that a yearly tenancy might *858 *thereby be implied.^b So, if a landlord suffer his tenant to continue in possession after the expiration of his lease, and receive rent from him accruing subsequent to the period of such expiration, he becomes thereby his tenant from year to year, upon the condition of the original lease.^c So, although a lease granted by a tenant for life, under a limited power of leasing, which exceeds his power, is void and not capable of being confirmed by the remainder-man, yet if the remainder-man raise money as rent, after the death of the tenant for life, it is an admission of a tenancy from year to year and a notice to quit must be given before any ejectment can be brought.^d And if on the determination of the title of the landlord the tenant continues to hold the premises under his successor, in the absence of any new contract, he will be considered to hold them on the same terms as under the original landlord.^e(1)

When a party is let into possession under a lease void by the statute of frauds payment and receipt of rent will not establish the lease, but it will create a tenancy from year to year, regulated by its covenants and conditions.^f

Possession under an agreement, is evidence of a yearly tenancy.

The same principle prevails if a party comes into possession under an agreement or lease invalid from any other circumstance, or under a valid agreement for a future lease. The receipt of rent is, in all cases, *prima facie* evidence of a yearly tenancy.^g "Where parties enter into a mere agreement for a future lease, they are tenants at will; but if rent is paid under the agreement, they become tenants from year to year."^h

The intention to create a yearly tenancy may be inferred from other circumstances besides the receipt and payment of rent. Thus, where ejectment was brought on the demise of

^a Doe d. Westmoreland v. Smith, 1 M. & R. 137. Mann v. Lovejoy, R. & M. 355. (21 Eng. C. L. 454.)

^b Cox v. Bent, 5 Bing. 185. (15 Eng. C. L. 410.)

^c Bishop v. Howard, 2 B. & C. 100. (9 Eng. C. L. 41.)

^d Doe d. Martin v. Watts, 7 T. R. 83. Doe d. Jordan v. Warde, 1 H. Bl. 97. Doe d. Tucker v. Morse, 1 B. & Ad. 365. (20 Eng. C. L. 398.)

^e Hutton v. Warren, 2 Gale, 71. 1 Mees. & Wels. 461. Buckworth v. Simpson, 1 Gale, 38. 1 C. M. & R. 834.

^f Doe d. Rigge v. Bell, 5 T. R. 471. Clayton v. Blakey, 8 T. R. 3.

^g Doe d. Warner v. Browne, 8 East, 165. Doe d. Pritchard v. Dodd, 2 N. & M. 838. 5 B. & Ad. 689. (27 Eng. C. L. 157.)

^h Per Littledale, J., in Hamerton v. Stead, 3 B. & C. 483. (10 Eng. C. L. 161.)

(1) (Lesley v. Randolph, 4 Rawle, 126.)

an infant which was compromised, and the tenant in possession attorned to the infant, though the lessor of the plaintiff, on his *coming of age, did not accept of rent or do any act to confirm the tenancy, yet as the former ejectment was brought at his suit and for his benefit, it was held, that he should not be allowed to consider the tenant as a trespasser, and bring a new ejectment without giving notice to quit.^a So also where a *feme covert* lived many years separated from her husband, and during that time received to her separate use the rents of certain lands which came to her by devise after separation, it was presumed that she received the rents by her husband's authority, and the court held, that a notice to quit must be given by him before he could maintain ejectment.^b

So where a rector succeeded to the rectory upon the death of the former incumbent, in April 1816. *A.* and *B.* were then in possession of the glebe lands, having been tenants of the former incumbent, and they continued in possession until after December 1816, when the rector conveyed the lands to trustees for securing an annuity; held, that the latter could not maintain an ejectment against *A.* and *B.* without giving them a notice to quit, for the rector must be presumed to have consented to the continuance of their tenancy under the terms of their previous holding.^c

A continuance in possession after the expiration of a term, is evidence of a yearly tenancy.

Where *A.* granted an annuity to *B.* out of certain lands, with power of distress and entry if the annuity should be in arrear, *A.* afterwards granted a lease for years of the lands to the defendant; the annuity having become in arrear, *B.* applied for it to the defendant, who thereupon entered into an agreement to attorn and become tenant to *B.*, and afterwards paid him rent; held, that this created a tenancy from year to year between *B.* and the defendant, determinable on the arrears of the annuity being paid, upon which the defendant's lease for years would revive.^d

Attornment.

A demise, "not for one year only, but from year to year," operates as a tenancy for two years certain at least, and therefore *cannot be put an end to at the end of the first year by six months' previous notice.^e But where furnished apartments were taken "*for twelve months certain, and six months' notice afterwards,*" it was contended that the defendant, under the above taking, was not at liberty to quit till six months' notice had been given after the expiration of the first year; but Lord Ellenborough was clearly of opinion that the defendant was only bound to remain the twelve months certain, and that he was at liberty to quit at the end of that period, by giving

^a Doe d. Miller v. Noden, 2 Esp. 530.

^b Doe d. Leicester v. Biggs, 1 Taunt. 367.

^c Doe d. Cates v. Somerville, 6 B. & C. 126. (13 Eng. C. L. 118.) 9 D. & R. 100. See Hutton v. Warren, ante, 858.

^d Doe d. Bevan v. Boulter, 1 Nev. & Perry, 650.

^e Denn d. Jackling v. Cartwright, 4 East, 29.

six months' previous notice. His lordship laid considerable stress upon the word *certain*, applied to the first twelve months, which showed that every thing afterwards was *uncertain*, and depended on the notice.^a

The presumption of a yearly tenancy may be rebutted.

As implied tenancies from year to year depend upon the presumption that it was the intention of the parties to create them, evidence is admissible to rebut such presumption; as where the rent is not paid and received as between landlord and tenant, but upon some other consideration, a tenancy from year to year will not be created.^b

Defendant in possession under a lease for fourteen years, assigned the lease, by way of mortgage, to plaintiff, and then committed a forfeiture, for which the lessor brought ejectment. It was then agreed, at a meeting of all the parties, that judgment should be signed in the ejectment, that the lessor should grant a new lease to plaintiff, and that plaintiff should grant an under-lease to defendant. The new lease was accordingly granted to plaintiff, who then delivered defendant the key, saying, "go on as usual, pay the money" (due on mortgage,) "and when you have done so, you shall have an under-lease;" held, that this did not constitute defendant tenant from year to year; for the defendant was not put into possession under an agreement for a lease, the intention was to spur him up to pay the money which was due, and under such a state ^{*861} of facts there was no room to imply a tenancy from year to year.^c

Tenancy at will.

A party who has been let into the possession of land under a contract of sale, or for a letting, which has not been completed, is a tenant at will to the vendor.^d If an agreement be made to let premises so long as both parties like, and reserving a compensation, accruing *de die in diem*, and not referable to a year, or any aliquot part of a year, it does not create a holding from year to year, but a tenancy at will strictly so called. And though the tenant has expended money on the improvement of the premises, that does not give him a right to hold them until he be indemnified.^e Where a minister of a dissenting congregation was placed in possession of a chapel and dwelling-house, by persons in whom the legal fee was vested, in trust to suffer the chapel to be used for the purposes of religious worship; it was held, that he was a mere tenant at will to those persons, and that his interest was determinable instant, by a demand of possession.^f

^a Thompson v. Maberly, 2 Camp. 573.

^b Right d. Dean of Wells v. Bawden, 3 East, 960. Sykes d. Murgatroyd v. —, cited in 1 T. R. 161. Roe d. Brune v. Prideaux, 10 East, 156.

^c Doe d. Rogers v. Pullen, 2 Bing. N. C. 749. (29 Eng. C. L. 474.) 2 Hodges, 39.

^d Ball v. Cullimore, 2 C. M. & R. 120. 1 Gale, 96. And see Goodtitle v. Herbert, 4 T. R. 680. Dunk v. Hunter, 5 B. & A. 322. (7 Eng. C. L. 115.) Doe d. Bingham v. Cartwright, 3 B. & A. 326. (5 Eng. C. L. 306.) Doe d. Hollingsworth v. Stennet, 2 Esp. 717.

^e Richardson v. Langridge, 4 Taunt. 128.

^f Doe d. Jones v. Jones, 10 B. & C. 718. (21 Eng. C. L. 153.) Doe d. Nicholl v. M'Keag, 10 B. & C. 721. (21 Eng. C. L. 154.)

There is no distinction with respect to notice between houses and land. Where there is a yearly tenancy, half a year's notice to quit, ending with the year of the tenancy, must be given in both cases, except by special agreement between the parties, or by some local custom.^a Neither will the circumstance of the rent being reserved quarterly vary the case, if the tenancy be from year to year.^b So if an house be let *from year to year*, to quit at a quarter's notice, the notice must be given to quit at the end of a quarter expiring with a year of the tenancy. But if the demise be for one year only, and then to continue tenant afterwards, and to quit at a quarter's notice, a quarter's notice ending at any time will be sufficient.^c So "where premises are taken under an agreement by which the "tenant is always to be subject to quit at three months' notice," this constitutes a quarterly tenancy, which may be determined by a three months' notice to quit, expiring at the same time of the year it commenced, or any corresponding quarter-day. But although the tenant under such an agreement enters in the middle of one of the usual quarters, if there appears to be no agreement to the contrary, he will be presumed to hold from the day he enters, and the tenancy can only be determined by a notice expiring that day of the year, or some other quarter-day calculated from thence.^d

There is no distinction in respect of notice between houses and land.

*862

In the case of an ordinary weekly tenancy, a week's notice to quit is not implied as part of the contract, unless there be a usage to that effect; but in absence of such usage, a weekly tenant who enters on a fresh week, may be bound to continue until the expiration of that week, or pay the week's rent.^e

Weekly tenancy.

Where a tenant from year to year dies, his personal representatives have the same interest in the land which he had, and are therefore entitled to the same notice to quit.^f

Where a party has put another into possession with a view to a future tenancy, or purchase, or circumstances of a similar nature, although he may have done no act acknowledging a regular tenancy, he cannot afterwards eject him without a demand of the possession, unless some wrongful act has been done by such party determining his lawful possession.^g Thus, where the party was let into possession under an agreement for the purchase of the land, and had possession formally given to him, and paid part of the purchase-money, (and there was no default on his part,^h) the court held, that a demand of possession was necessary.ⁱ So, where *A.* entered into an agreement with *B.* to sell land then in possession of the latter, on certain terms,

When a demand of possession is necessary though there is no regular tenancy.

^a *Right v. Darby*, 1 T. R. 162.

^b *Shirley v. Newman*, 1 Esp. 267.

^c *Doe d. Pitcher v. Donovan*, 1 Taunt. 555. 2 Camp. 78.

^d *Kemp v. Derrett*, 3 Camp. 510.

^e *Huffell v. Armistead*, 7 C. & P. 56. (33 Eng. C. L.)

^f *Doe d. Shaw v. Porter*, 3 T. R. 13. *Parker d. Walker v. Constable*, 3 Wils. 24. And see 2 D. & R. 706. (16 Eng. C. L. 115.)

^g *Adams*, 121.

^h *Doe d. Parker v. Boulton*, 6 M. & S. 148.

ⁱ *Right d. Lewis v. Beard*, 13 East, 210.

- *863 and to execute a conveyance in case *A.* should be found owner thereof, and could make a good title *thereto; and agreed that in the mean time *B.* should remain in possession; held, that *A.* could not bring ejectment against *B.* to try the title without having demanded possession, or otherwise determined *B.*'s tenancy.^a So also, when a party is admitted into possession under an invalid lease, the landlord must demand possession, or in some other manner determine the will, before he can maintain ejectment, although he has not acknowledged the party as his tenant.^b So if the agent of mortgagee applies to a person in possession of the land for rent, he cannot afterwards eject him without a demand of possession.^c

A notice need not be in writing. No particular form is necessary.

2.—*Form of the notice*] Notice by parol is sufficient,^d unless required to be in writing by agreement between the parties, or the provisions of a power.^e When the landlord intends to enforce his claim for double value, if the tenant holds over, it is *necessary* that the notice should be in writing; and in all cases it is advisable, as it prevents mistakes, and renders the evidence certain and correct. But it is advisable that there should not be a subscribing witness to the notice, for it may cause some difficulties in the proof. It has been held, that a notice to quit in writing, signed by the party giving it, and attested by a witness, must be proved by calling that witness, or his absence must be accounted for—proof that it was served on the tenant, that he read it, and did not object to it, is not sufficient.^f

- *864 The words of the notice should be clear and decisive, without any ambiguity, or giving any alternative to the tenant. If, however, it appears clearly on the face of the notice that the landlord's only object was to turn out the tenant, it will be sufficient, though it apparently contains an alternative—as *where the words were, "I desire you to quit the possession at Lady-day next, &c., or I *shall insist upon double rent*," it was held sufficient, because the latter part of the notice evidently referred only to the penalty inflicted by 4 Geo. II, c. 28, though the terms of that statute, which gives *double the annual value*, were mistaken.^g

Where the notice was to quit "on the 25th^l day of March,

^a Doe d. Newby v. Jackson, 2 D. & R. 514. 1 B. & C. 448. (8 Eng. C. L. 126.)

^b Goodtitle d. Herbert v. Galloway, 4 T. R. 680. Clayton v. Blakey, 8 T. R. 3. Thunder d. Weaver v. Belcher, 3 East, 449, 451. Doe d. Warner v. Browne, 8 East, 165.

^c Doe v. Hales, 7 Bing. 322. (20 Eng. C. L. 147.)

^d Timmins v. Rowllison, 3 Burr. 1603. Doe d. Macartney v. Crick, 5 Esp. 196. Roe v. Pearce, 2 Camp. 96.

^e *Id.* Legg d. Scott v. Benion, Willes, 47.

^f Doe d. Sykes v. Durnford, 2 M. & S. 62.

^g Doe d. Mathews v. Jackson, Doug. 175. But if the notice had really contained the option of a new agreement, and said for instance, "or else that you agree to pay double rent, it would not have been good." Per Lord Mansfield, *id.*

or 6th day of April next ensuing," and was delivered before new Michaelmas-day, it was held to be a good notice; as being intended to meet an holding commencing either at new, or old Lady-day, and not to give an alternative.^a So in case of an obvious mistake, the court will not invalidate the notice. As where a notice was given at Michaelmas, 1795, to quit at Lady-day, which will be in 1795, and the defendant was told at the time of the delivery of the notice, that he must quit *next* Lady-day; it was held sufficient notice to quit at Lady-day, 1796.^b

Where the tenancy commenced in February, and notice was served in October, 1833, to quit at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year's holding of the said messuage shall expire after the expiration of half a year from the delivery of this notice; held, that the notice was good for February, 1835, and that the word "present" must be taken to be referable to the expiration of the year current after that time.^c So, where there was a misdescription of the premises in the notice, which could lead to no mistake, the house being described therein as the *Waterman's Arms* instead of the *Bricklayer's Arms*, no sign called the Waterman's Arms being in the parish, the notice was deemed good.^d

As a lessor cannot determine the tenancy as to part of the things demised, and continue it as to the rest, the notice "must include all the premises held under the same demise; and the courts will, if possible, give effect to the notices, so as to determine the tenancy altogether.^e Where a house, lands and tithes are held under a parol demise at a joint rent, a notice to quit "the house, lands, and premises, with the appurtenances," was held to include the tithes; for the tithes having been held along with the farm, the notice must have been understood by both parties to apply to both.^f

Where the notice is directed to the tenant by a wrong Christian name, and he keeps it, the misdirection is waived.^g

3.—*By whom notice should be given.*] The notice to quit must be given by the person interested in the premises, or his authorised agent; and such agent must be clothed with his power to give the notice at the time when the notice is given; a subsequent assent on the part of the landlord being not sufficient to establish by relation a notice given in the first instance without his authority. The notice should be given by the lessor, or his agent duly authorized

Therefore, where a lease for twenty-one years contained a

^a Doe d. Mathewson v. Wrightson, 4 Esp. 5.

^b Doe d. Duke of Bedford v. Kightley, 7 T. R. 63.

^c Doe d. Williams v. Smith, 2 Har. & Wol. 176.

^d Doe d. Cox v. —, 4 Esp. 185.

^e Doe d. Rold v. Archer, 14 East, 245.

^f Doe d. Morgan v. Church, 3 Camp. 71. Le Blanc.

^g Doe v. Spiller, 6 Esp. 70.

proviso, that in case either landlord or tenant, or their respective heirs or executors, wished to determine it at the end of the first fourteen years, and should give six months' notice in writing under his or their respective hands, the term should cease; held, that a notice to quit, signed by two only of three executors of the original lessor, to whom he had bequeathed the freehold as joint-tenants, expressing the notice to be given on behalf of themselves and the third executor, was not good under the proviso, which required it to be given under the hands of all three. Neither could such notice be sustained under the general rule of law, that one joint-tenant may bind his companions by an act done for his benefit; for *non constat* that the determination of the lease was for the benefit of the co-joint tenant; which it was incumbent on the party who wished to avail himself of it to prove. And the notice to quit being such as the tenant was to act upon at the time, no subsequent recognition *of the third executor will make it good by relation; nor was his joining in the ejectment, evidence of his original assent to bind the tenant by the notice.^a If one of several joint-tenants gives notice on behalf of himself and the others, it is sufficient as to all; for the true character of a joint-tenancy is that the tenant holds the *whole* of *all* so long as *he* and *all* shall please; and as soon as any one of the joint-tenants gives a notice to quit, he effectually puts an end to *that* tenancy.^b

It has been held that notice given by a stranger purporting to act as agent for all the joint-tenants was sufficient, though he was authorised by some of them only at the time, the others having subsequently recognised his authority before the action was brought, in accordance with the maxim, *omnis ratihabitio*,^c &c. But in a subsequent case it was ruled that, to render notice by an agent valid, his authority to give such notice must be complete at least before day of the demise laid in the declaration; and that an authority to receive rent does not imply an authority to give notice to quit. The court said that the subsequent ratification after the notice had been given would not be sufficient; that the notice was only valid from the time that it became the notice of the landlord.^d And in a very recent case, where the notice was served by a person who was employed to receive the rents by the agents of the plaintiffs, who were mortgagees, which person knew nothing of the plaintiffs themselves, but he had frequently paid the rents into the bank

Authority
of an agent
to give notice.

Notice by
the agent
of an agent
not sufficient.

^a Doe d. Fisher v. Cuthell, 5 East, 491. 2 Smith, 83. 5 Esp. 149.

^b Doe d. Aslin v. Summersett, 1 B. & Ad. 135. (20 Eng. C. L. 361.) This case overrules Doe d. Whayman v. Chaplin, 3 Taunt. 120.

^c Goodtitle d. King v. Woodward, 3 B. & A. 689. (5 Eng. C. L. 424.) Parke, J., expressed himself dissatisfied with the reasons given for this decision in 10 B. & C. 634. (21 Eng. C. L. 141.) The decision, however, seems to be correct, according to the principles laid down in Doe v. Summersett, *supra*, for if notice from one joint tenant is sufficient, notice from the agent of one, duly authorised, must be sufficient; and in this case the agent had the authority of one before he served the notice.

^d Doe d. Mann v. Walters, 10 B. & C. 626. (21 Eng. C. L. 139.)

on their account, and had previously given notices to quit to other tenants, which had been acted upon without objection; the court held that the notice was not sufficient. Tindal, C. J. observed that the person who gave the notice was merely the "agent of an agent, there should have been *more* evidence (he was far from saying that there was not *some* evidence) either of an original authority from the mortgagees to this person, or of a subsequent recognition by them of his acts."

*867

If the joint lessors be partners in trade, a notice to quit by Church-one in the name of all is sufficient.^b Notice to quit to a tenant of lands originally devised to the churchwardens of a parish and their successors in trust, signed by the rector and churchwardens, requiring him to deliver up the premises to the rector and churchwardens for the time being, is insufficient; for it is uncertain in its intent, as there were no such persons as the rector and churchwardens known to the law as a continuing body, like a body corporate, and as the defendant could not know to whom he was to deliver possession.^c The steward of a corporation may give notice to quit without authority under seal, and if the corporation afterwards bring ejectment upon such notice, it will be a sufficient recognition of his authority.^d A receiver appointed by the court of Chancery with a general authority to let the lands from year to year, is a sufficiently authorised agent to give notice to quit.^e

Corporation.

4.—*To whom notice should be given.*] The notice should in all cases be served on the tenant of the person serving it; if the premises be underlet, the sub-tenancy must be determined either by a notice from the lessor to the lessee, or from the lessee to the undertenant, notice from the lessor to the undertenant is insufficient, there being no proof of contract between them. Where the service was upon a relation of the undertenant *on the premises*, it was held to be insufficient, although the notice was addressed to the original tenant.^f

Notice should be served on the tenant.

Where a lease contained a power to determine the term by giving six months' notice "to the tenant;" held, that a notice directed to and served upon *T. M.*, who resided on the premises and described himself as the servant of his brother, the tenant, whose name was *J. M.*, was insufficient, though in a subsequent conversation with the lessors of the plaintiff the tenant said "those notices were not directed to me, I did not regard them," which amounted to an admission that he had received the notice.^g

* Doe d. Rhodes v. Robinson, MS. C. P. T. T. 1837.

^b Doe d. Elliott v. Hulme, 2 M. & Byl. 433. (17 Eng. C. L. 136.)

^c Doe d. Brooks v. Fairclough, 6 M. & S. 40.

^d Roe d. Dean of Rochester v. Peirce, 3 Camp. 96.

^e Wilkinson v. Colley, Burr. 2694. Doe d. Marsack v. Read, 19 East, 57.

^f Doe d. Mitchell v. Levi, Adams, 130. Roe v. Wiggs, 2 N. R. 330. Pleasant d. Hayton v. Binson, 14 East, 234.

^g Doe d. Exeter, Corporation of, v. Mitchell, MS. Coram Patteson, J., Sum. Assiz. Devon., confirmed in Q. B. M. T. 1837.

Where *A.* had been tenant of certain premises, and upon his
 *868 *leaving them *B.* took possession; held, that in the absence of any evidence to the contrary, it might be presumed that he came in as assignee of *A.*, although he never paid rent, and that notice to quit was rightly given to *B.*^a

If two tenants hold premises in common, notice to quit addressed to all and served upon one of them is sufficient.^b Where a corporation is tenant, notice to quit should be addressed to the corporation, and served upon its officers.^c With
 Mode of respect to the mode of serving notice, it should in all cases be
 serving. served on the tenant himself if possible, though personal service is not necessary; it will be sufficient if the notice be left with the wife or servant of the tenant at his usual residence, whether that be upon the demised premises or not, and its nature and contents explained at the time.^d But the mere leaving of a notice to quit at the tenant's house with a servant, without further proof of its having been explained to the servant, or that it came to the tenant's hands, has been held to be insufficient.^e

The notice should expire at the end of the current year of the tenancy. 5.—*At what time notice should expire.*] In general, whenever a tenancy from year to year subsists, the notice to quit must be given *half a year* previous to that time of the year when the tenancy commenced, so that the notice may expire at the end of the current year of the tenancy; thus, if the tenancy commenced on the 1st of May, notice to quit should be given before the 1st of November, that is, six calendar months before the 1st of May; but if the tenancy commenced at any of the usual feasts, as at Michaelmas, Lady day, or Christmas day, the notice may be given prior to the corresponding feasts happening in the middle of the year, though six calendar months may not intervene between the two feast days, from feast to feast being the usual half year's computation;
 *869 *thus, notice on the 28th of September to quit on Lady day (the 25th of March) is sufficient.^f Notice to quit on or about the expiration of six calendar months from the 29th of September was held to be sufficient to determine a tenancy commencing on the 25th of March, the court ruling the word *calendar* to be surplusage;^g and where notice was given on the 27th of September to quit "at the expiration of the term

^a Doe d. Morris v. Williams, 6 B. & C. 41. (13 Eng. C. L. 105.) 9 D. & R. 30.

^b Doe d. Lord Macartney v. Crick, 5 Esp. 196. Doe d. Lord Bradford v. Watkins, 7 East, 551.

^c Doe d. Lord Carlisle v. Woodman, 8 East, 228.

^d Jones d. Griffith v. Marsh, 4 T. R. 464. Doe d. Neville v. Dunbar, M. & M. 10. (22 Eng. C. L. 233.) Doe d. Blair v. Street, 3 Ad. & Ell. 329. (29 Eng. C. L. 108.)

^e Doe d. Buros v. Lucas, 5 Esp. 153.

^f Roe d. Durant v. Doe, 6 Bing. 574. (19 Eng. C. L. 169.) Doe d. Harrop v. Green, 4 Esp. 198.

^g Howard v. Wemaley, 6 Esp. 53.

for which you hold the same," Holroyd, J., permitted evidence to be given of a general custom of the country to let from Lady day to Lady day.^a

The principle respecting notice to quit is equally applicable to houses as to land; they are both formed by one rule, for the same inconvenience might arise in one case as in the other, since the value of houses varies considerably at different periods of the year.^b But with respect to houses, the rule applies only in cases of a yearly tenancy. Where the letting is for a less period than a year, as in the case of lodgings, the custom for the most part requires the same space of time for the notice as the period for which the lodgings were taken, as a month's notice when taken by the month, or a week's notice when taken by the week.^c The period of notice may however, be controlled by special agreement. A demise for one year only, and then to continue tenant afterwards and quit at a quarter's notice;^d and an agreement that the tenant should be subject to quit at three months' notice, have been held to be demises determinable at the end of any quarter;^e but a quarterly reservation of rent does not imply an agreement to dispense with the regular half year's notice to quit.^f The period of notice may also be controlled by custom, as for instance by the custom of London, if "the tenant rents premises at a yearly rent under 40s., he is entitled to a quarter's notice only, but if the rent exceed that amount he is entitled to a half year's notice to quit."^g

Notice in case of lodgings.

Notice may be controlled by custom
*870

The time when a tenancy from year to year commences and expires, takes its date, in the absence of all other circumstances, from the time when the tenant actually enters upon the demised premises; but this general rule may be varied, both as to the commencement and expiration of the tenancy, either by express agreement or legal inference.^h If no direct evidence can be given as to the time of entry, the custom of the country is *prima facie* evidence of the time; if there be no such custom, the rent day is to be considered as the day of entry. If there be two rent days, the plaintiff's notice shall be presumed to be right till the defendant prove it to be wrong; and if the tenant enters about the usual day, the entry shall relate to such day.ⁱ But notice to quit is not *prima facie* evidence that the tenancy commenced on the day specified in the notice, unless it be personally served on the defendant, and he reads it and does not

The commencement of a tenancy may be dated from the time of entry on the premises.

^a Doe d. Milnes v. Lamb, Adams, 316.

^b Right d. Flower v. Darby, 1 T. R. 159. See *ante*, 861.

^c Doe d. Parry v. Hazell, 1 Esp. 94. Wilson v. Abbott, 3 B. & C. 89. (10 Eng. C. L. 17.) See Doe d. Campbell v. Scott, 6 Bing. 362. (19 Eng. C. L. 104.) 4 M. & P. 20.

^d Doe d. Pitcher v. Donovan, 1 Taunt. 555. But on a letting from year to year, to quit at a quarter's notice, the notice must expire at the period of the year when the tenancy commenced, *id.* 8. C. 2 Camp. 78.

^e Kemp v. Derrett, 3 Camp. 511.

^f Shirley v. Newman, 1 Esp. 266.

^g Tyley v. Seed, Skin. 649. Doe d. Henderson v. Charnock, Peake, 4.

^h Kemp v. Derrett, 3 Camp. 510.

ⁱ 2 Stark. Ev. 300.

object to it at the time of the service.^a Where the tenant at the time of the service complained that he had been harshly treated, but did not object to the notice, it was held that he was not thereby precluded from showing at the trial that the notice had been served too late.^b But where the defendant on application by the lessor's attorney stated his tenancy to have commenced on a particular day, and notice was given in conformity with his answer, it was held that he was concluded by it, as he had induced the plaintiff to act upon it.^c

Where the holding is under a lease.

If a person is let into possession as a yearly tenant, and afterwards takes a lease of the premises, and continues to hold the land after the lease has expired, the time of the expiration of the tenancy created by such holding over, will be regulated by the terms of the lease, and not by the time of the original entry.^d And the same rule applies to his assignees; the time of the expiration of their tenancies will be the same as if the original lessee had continued in possession;^e and the principle is the same if the tenant holds under a lease void by the statute of frauds; the time of the notice must be regulated by the void lease.^f So if a remainder-man receives rent from a person in possession under a lease granted by the tenant for life, but void against the remainder-man, the time of notice to quit will be regulated by the terms of the lease, and not by the time of the death of the tenant.^g

Where the tenant enters in the middle of a quarter.

Where a tenant entered in the middle of a quarter, and paid rent for that half-quarter ending at Christmas, and afterwards paid rent half-yearly, at Midsummer and Christmas; it was held that his tenancy commenced from Christmas and not from the preceding half-quarter.^h But where the tenant entered in the middle of a quarter upon an agreement "to pay rent quarterly and for the half quarter," it was left to the jury whether the party was tenant from the quarter day prior to the time when he entered, or from the succeeding quarter-day; and under the direction of Lord Ellenborough, C. J., the jury found that the tenancy commenced with the preceding quarter.ⁱ

Where the holding is from feast to feast.

Where the holding is from feast to feast, as from Michaelmas to Michaelmas, it will, *prima facie*, imply such feast according to the *new style*;^j evidence, however, will be admitted to show, that according to the custom of the country, such

^a Doe d. Ash v. Calvert, 2 Camp. 388. Thomas v. Thomas, *id.* 647. Doe d. Foster, 13 East, 406.

^b Oakapple d. Green v. Copous, 4 T. R. 361.

^c Doe d. Eyre v. Lambley, 2 Esp. 635.

^d Doe d. Spicer v. Lea, 11 East, 319.

^e Doe d. Castleton v. Samuel, 5 Esp. 173.

^f Doe d. Rigge v. Bell, 5 T. R. 474. Doe d. Peacock v. Raffan, 6 Esp. 4.

^g Doe d. Collins v. Weller, 7 T. R. 478. Right d. Flower v. Darby, 1 T. R. 159.

^h Doe d. Holcomb v. Johnson, 6 Esp. 10. Savage v. Stapleton, 3 C. & P. 275. (14 Eng. C. L. 303.)

ⁱ Doe d. Wadmore v. Selwyn, Adams, 145.

^j Doe d. Hinde v. Vince, 2 Camp. 266.

tenancies commenced according to the old style,^a unless the demise be by *deed*, to hold from one feast to another; then it will be considered a tenancy according to the *new style*, and extrinsic evidence will not be admitted to show that the *old style* was intended.^b

*Where a tenant enters upon different parts of the premises at different periods of the year, if they be all contained in one demise, and it does not appear from any express agreement at what time the tenancy was to commence; the rule is, that notice to quit must be given with reference to the time of entry upon that which is the principal and substantial part of the demised premises;^c and it is a question of fact for the jury, which is the principal and which is the accessorial subject of the demise.^d *872

Where there is an entry on different parts of the premises at different times.

Where the landlord agreed to let the defendant a farm, to hold the arable land from the 13th of February, the pasture from the 5th of April, and the meadow from the 12th of May, at a yearly rent payable at old Michaelmas and old Lady-day it was held to be a tenancy from old Lady-day to old Lady-day; because the custom of most countries would have required the tenant to have quitted the arable and meadow lands on the 13th of February and 12th of May, without any special agreement, and a notice to quit at old Lady-day, delivered before old Michaelmas, was held sufficient.^e So where the agreement was that the tenant "should enter on the tillage land at Candlemas, and on the house and all other the premises at Lady-day following, and that when he left the farm he should quit the same according to the times of entry as aforesaid," and the rent was reserved half-yearly at Michaelmas and Lady-day; held, that a notice to quit delivered half a year before Lady-day, but less than half a year before Candlemas, was good; the taking being in substance from Lady-day, with a privilege for the in-coming tenant to enter on the arable land at Candlemas for the sake of ploughing, &c.^f

Under an agreement of demise, dated in January, of a *dwelling-house, and other buildings for the purpose of carrying on a manufacture, together with certain meadow, pasture, and bleaching-grounds, watercourses, &c., for a term of thirty-five years, to commence, as to the meadow ground, from the 25th of December last; as to the pasture, from the 25th of *873

^a *Furley v. Mayor of Canterbury v. Wood*, 1 Esp. 198. *Doe v. Hall v. Benson*, 4 B. & A. 588. (6 Eng. C. L. 527.)

^b *Doe v. Spicer v. Lea*, 11 East, 312.

^c *Doe v. Strickland v. Spence*, 6 East, 120.

^d *Doe v. Heapy v. Howard*, 11 East, 498.

^e *Doe v. Dagget v. Snowdon*, 2 Bl. 1224. But where a tenant held a farm as to the arable lands from Candlemas, and as to the buildings and pastures from May-day, and the rent was payable at Michaelmas and Lady-day, a notice to quit given six months before May-day, but not six months before Candlemas, was held insufficient. *Doe v. Grey de Wilton*, (Lord,) 2 East, 384, n. But it did not appear in this case whether six months' notice previous to Lady-day had been given.

^f *Doe v. Strickland v. Spence*, 6 East, 120. 2 Smith, 255.

March next; and as to the housing, mills, and all the rest of the premises, from the 1st of May; reserving the first year's rent on the day of Pentecost, and the other half-year's rent at Martinmas; held, that the substantial subject of demise being the house and buildings, for the purpose of the manufacture, which were to be entered on the first of May, that was the substantial time of entry to which a notice to quit ought to refer, and not to the 25th of December, when the in-coming tenant had liberty of entering on the meadow, which was merely auxiliary to the other and principal subject of demise; and consequently that a notice to quit, served on the 28th of September, (which would have been sufficient with reference even to the 25th of March, the day of entering on the pasture ground, the 29th of September being the corresponding half-yearly day of holding to the 25th of March,) to quit at the expiration of the current year of holding, was sufficient.*

6.—*Waiver of notice.*] The notice to quit may be waived by several acts of the lessor or the plaintiff. That which most usually occasions a waiver is the acceptance of rent accruing after the expiration of the notice; but in order that the acceptance of rent may operate as a waiver, the rent must be paid and received *as rent*; for if the acceptance of it be accompanied with any circumstance indicating an intention on behalf of the landlord not to continue the tenancy, or if there be any fraud, or contrivance on the part of the tenant in paying it, it will not operate as a waiver of the notice. It is a question for the jury to determine in such cases, what the real intention of the parties was—where the landlord accepted rent which became due after the expiration of the notice, and did not bring his ejectment until afterwards, nor try the cause, until two years subsequently, the jury found that the notice **was* waived.^b But where the landlord proceeded immediately with the action after the expiration of the notice and subsequently received rent, but nevertheless continued the action; the court held, that a fair inference might be drawn from the conduct of the landlord, that he did not mean to waive his notice by accepting the rent.^c So where rent was usually paid at a banker's, and the banker, without any authority from the plaintiff, received a quarter's rent from the tenant after the expiration of the notice; it was held, in the absence of any proof that the rent had come to the landlord's hands, not to be a waiver.^d A distress for rent accruing after the expiration of the notice, or a recovery of it in an action for use and occupation, is a waiver; for such acts must be taken as a con-

* Doe d. Bradford (Lord) v. Watkins, 7 East, 551. 3 Smith, 517.

^b Goodright d. Charter v. Cordwent, 6 T. R. 219.

^c Doe d. Cheney v. Batten, Cowp. 243.

^d Doe d. Ash v. Calvert, 2 Camp. 387.

firmation of the tenancy.^a But the fact of *bringing* an action for use and occupation, will not of itself invalidate the notice; for the landlord may only recover rent to the time of the expiration of the notice, although he claim rent to a later period.^b

The notice may be also waived, by serving a second notice, after the expiration of the first, for it recognises a subsisting tenancy.^c But such second notice is open to explanation; and if it appears that it was not intended or understood to be intended as a waiver of the first, or as an acknowledgement of a subsisting tenancy, it will not operate as a waiver. Giving a second notice.

As where a landlord gave notice to quit different parts of a farm at different times, which the defendant neglected to do in part, in consequence of which the landlord commenced an ejectment; and before the last period mentioned in the notice was expired, the landlord fearing that the witness, by whom he was to prove the notice, would die, gave another notice to quit, "at the respective times in the following year, but continued to proceed with his ejectment; held, that the second notice was no waiver of the first, for the tenant could not suppose that the landlord meant to waive a notice, upon the foundation of which he was proceeding to turn him out of his farm.^d So where, after the expiration of the first notice, the landlord gave a second notice, desiring the tenant to quit within fourteen days, or that he should insist upon double value; it was held not to be a waiver of the first, for the object of it was merely the recovery of double value.^e So where a notice was given "to quit the premises *which you hold under me*, your term therein having long since expired," the court considered the paper as a mere demand of possession, and not as a recognition of a subsisting tenancy.^f But where the defendant was assignee of the original lessee, and notice to quit was given to the latter in March, 1810, some days after the assignment, and in March, 1811, a notice was served on the defendant to quit at Michaelmas; held, that the latter notice operated as a waiver of the former; for it gave the defendant to understand, that if he quitted at Michaelmas, 1811, he would not be deemed a trespasser.^g

*875

Where a landlord gave notice to quit, but promised the tenant not to turn him out, unless the premises were sold; and

^a Zouch d. Ward v. Willingale, 1 H. Bl. 311.

^b Per Buller J., in Birch v. Wright, 1 T. R. 378. Where a landlord, after verdict in ejectment, distrained for rent which became due after the expiration of the notice, and the tenant paid the rent, it was held to be no ground for staying the subsequent proceedings in the ejectment; for the distress was wrongful, and might have been disputed. Doe d. Holmes v. Davies, or Derby, 2 Moore, 581. 8 Taunt. 538. (4 Eng. C. L. 303.)

^c Doe d. Brierly v. Palmer, 16 East, 53.

^d Doe d. Williams v. Humphrey, 2 East, 337.

^e Doe d. Digby v. Steel, 3 Camp. 115. See Messenger v. Armstrong, 1 T. R. 53.

^f Doe d. Godsell v. Inglis, 3 Taunt. 54.

^g Doe d. Brierly v. Palmer, 16 East, 53.

when the premises were sold, the tenant refused, on demand, to deliver up possession; the court held, that the promise (which was no more than a permission to occupy until he sold the premises) did not amount to a waiver; for it was not thereby intended to vacate the notice, or to abandon any of the rights which the landlord had acquired under it.^a

Notice to quit is not necessary where the relation of landlord and tenant does not subsist.

*876

7.—*When notice to quit is not required.*] We have seen, that notice to quit is required wherever there exists a tenancy from year to year, or whenever a tenancy is subsisting, ^aand the time of quitting is not agreed upon between the parties. It is observable, however, that no such notice is necessary where the relation of landlord and tenant does not in fact subsist;^b or where the possession is adverse;^c or where the possession is under a lease determinable on a certain event, or at a fixed time;^d or where there is one half year's rent in arrear, and there is no distress on the premises, and the landlord has a right of re-entry on non-payment.^e

Where a party occupies under an agreement for a lease during the whole term for which the lease was to be granted, a notice to quit is not necessary at the end of such term, as the agreement is evidence of the *expiration* of the tenancy, as well as of the other terms of the holding.^f

Notice is not necessary where the tenant disclaims the title of the lessor.

If the tenant does any act which amounts to a disclaimer of the lessor's title, it operates as a forfeiture, and notice to quit is not necessary, for the landlord may treat him as a trespasser. As if he refuse to pay rent, on the ground that another person had ordered him not to pay any;^g or if he attorn to another person.^h Where a lessee disclaimed the lessor's title as to part of the demised premises; held, that the lessor might maintain ejectment for that part.ⁱ Where the defendant held premises under a tenant for life, on whose death possession was claimed, and rent demanded by the heir at law of the devisor; whereupon the defendant wrote to the attorney of the heir at law, stating that he held as tenant to *J. S.* (the husband of the tenant for life) in right of his wife; that he had never considered the claimant as the landlord of the house; that he should be ready to pay the arrears to any person who should be

^a Whiteacre d. Boulton v. Symonds, 10 East, 13.

^b As where one got into a house without the privity of the landlord, and they afterwards entered into a negotiation about a lease, but did not agree; it was held that no tenancy subsisted, and that no notice was necessary. Doe d. Knight v. Quigley, 2 Camp. 505. And see Doe d. Moore v. Lawder, 1 Stark. 308. (2 Eng. C. L. 402.)

^c Doe d. Foster v. Williams, Cowp. 622. Doe d. Cheese v. Creed, 3 M. & P. 648.

^d Cobb v. Stokes, 8 East, 358. Messenger v. Armstrong, 1 T. R. 54. Right d. Flower v. Darby, 1 T. R. 162.

^e 4 G. II, c. 28, s. 2.

^f Doe d. Tilt v. Stratton, 4 Bing. 446. (14 Eng. C. L. 36.) 1 M. & P. 183. And see Doe d. Broomfield v. Smith, 6 East, 520.

^g Doe d. Whitehead v. Pittman, 2 N. & M. 673. (28 Eng. C. L. 375.)

^h B. N. P. 96.

ⁱ Doe d. Phipps v. Gowen, MS. M. T. 1837, Q. B.

proved to be heir at law; but that he must decline taking upon himself to decide upon the claim made on him, without more satisfactory proof, in a legal manner; held, that this letter amounted to a disclaimer ^aof the title of the heir at law, and that he might maintain ejectment against the tenant, without giving him a previous notice to quit.^a So where a tenant for years delivered up the possession of the premises, with the lease, to a party who claimed by a title adverse to that of the landlord, with intent to assist him in setting up that title, and not that he should hold *bona fide* under the lease; it was held, that the term was forfeited by the act of betraying possession.^b

*877

Where a tenant pays rent to a third person, and allows him to mark and cut the trees, and these acts are done by a person claiming to be landlord, the submission to them by the tenant is an acknowledgment of the title of the claimant.^c Where the tenant on being applied to for rent, said that his connection as tenant with the party applying had ceased for many years, it was held to be evidence of an antecedent disclaimer.^d But the mere refusal to pay rent to a devisee under a contested will, accompanied with a declaration that he (the tenant) was ready to pay the rent to any person who was entitled to receive it, is not a disavowal sufficient to dispense with the necessity of a regular notice.^e

A disclaimer in such case must be before the date of the day of the demise. An admission, made after the day of the demise, of a disclaimer, must, to have the effect of determining a tenancy, amount to an admission that such disclaimer took place before the day of demise.^f

A mortgagee may maintain ejectment against the mortgagor in possession, after the forfeiture of the mortgage, without any previous notice to quit on demand of possession.^g So he may against those who hold under the mortgagor, without his, the "mortgagee's, privity;" except in cases of tenancies created previous to the mortgage, in respect of which the situation of the mortgagee is the same as that of the mortgagor, before the mortgage was made.^h The like principle prevails with regard to claimants under a writ of *elegit*.ⁱ

*878

^a Doe d. Calvert v. Frowd, 4 Bing. 557. (15 Eng. C. L. 70.)

^b Doe d. Ellerbrock v. Flynn, 1 C. M. & R. 137. 4 Tyr. 619.

^c Per Lord Tenterden, C. J., in Doe d. Grubb v. Grubb, 10 B. & C. 824. (21 Eng. C. L. 176.)

^d *Id.*

^e Doe d. Williams v. Pasquali, Peake, 196. And see Doe d. Dillon v. Parker, Gow. 180.

^f Doe d. Lewis v. Cawdor, 1 C. M. & R. 398. In an ejectment by a landlord against his tenant, the landlord relied on a disclaimer. It was proved that the tenant disclaimed in March, 1833; in November, 1833, the landlord put in a distress for rent; held, a waiver of the disclaimer. Doe d. David v. Williams, 7 C. & P. 322. (39 Eng. C. L.) Patteson.

^g Doe d. Fisher v. Giles, 5 Bing. 621. Keach v. Hall, Doug. 422.

^h Doe d. Sheppard v. Allen, 3 Taunt. 78. Thunder d. Weaver v. Belcher, 3 East, 449.

ⁱ *Id.*

^j Adams, 109.

Where there was an agreement between *P.* and *W.* for the sale of lands to the latter, to be completed on the 25th of March, and before that day, *W.* agreed to let to the defendant from that day, and the defendant was let into possession before the day by consent of *P.*, upon notice to him of the agreement to let; and on the 29th of May, a conveyance was executed, as of the 25th of March, subject to a term, redeemable on payment by *W.* of the purchase money with interest, with a power to *P.* to enter on default of payment by *W.*; held, that *P.* might bring ejectment for default of payment, without giving the defendant notice to quit.*

SECTION VII.

THE DECLARATION.

	PAGE		PAGE
1. How the declaration should be entitled.		4. How the demise should be laid in respect of time.	889
2. The venue.	880	5. Locality of the premises.	884
3. How the demise should be laid in respect of title.	880	6. Description of the premises.	886
		7. Of the notice to appear.	886

1.—*How the declaration should be entitled.*] THE suit in ejectment is commenced by the delivery of the declaration against the casual ejector to the tenant in possession; who is thereby informed of the claim set up by the lessor, and required to appear and defend his title.

The declaration should regularly be entitled of the term in which it is delivered, or if it be delivered in vacation, (as is usually the case,) of the preceding term; and though the demise be laid after the first day of that term, yet the defendant, *879 *being a fictitious person merely, cannot take advantage of the objection; and if the tenant appear, and apply to be admitted defendant instead of the casual ejector, he is bound by the consent rule to accept a declaration entitled of a subsequent term.^b But if the declaration be entitled of any term, or of a particular day without any term, or of a wrong term, or of a year which had not arrived, it will be immaterial, provided the tenant has sufficient notice given him to appear to the action.^c

When the ejectment is by a landlord against his tenant, or against any person claiming under or through such tenant, upon

* Doe d. Parker v. Boulton, 6 M. & S. 148.

^b Adams, 207. Run. 239. Tidd's N. P. 625.

^c *Id.* Doe d. Ashman v. Roe, 1 Bing. N. C. 253. (27 Eng. C. L. 377.) Doe d. Willis v. Roe, 1 W. W. & Dav. 76. Doe d. Smithers v. Rowe, 4 Dowl. 374. Doe d. Phipps v. Roe, 3 Hodges, 33.

a right of entry, accruing in or after *Hilary* or *Trinity* terms respectively, the declaration should be entitled the day next after the day of the demise therein, whether such day be in the term or in the vacation.*

*2.—*The Venue.*] The venue in ejectment is local, and therefore must be laid in the county in which the premises sought to be recovered are situated. But the venue in the margin is immaterial, if the venue in the body of the declaration be correct.^b *880
The venue is local.

3.—*How the demise should be laid in respect of title.*] The demise must be consistent with the title of the lessor; that is, it must be such as, if actually made, would have transferred the right of possession to the lessee.⁽¹⁾ If there be several lessors, the demise stated in the declaration must be such, as their title will warrant. If the declaration states a joint demise, it must be shown that each lessor had such a legal title as would enable any one of them to demise the whole of the premises; for if any one of them had not a legal interest in the whole, he cannot in law be said to demise them.* As where *A.* was tenant for life, and *B.* had the remainder in fee, and they made a lease to *C.*, and declared upon the lease as a *joint demise*; it was held bad; because, during *A.*'s life, it was the lease of *A.* and the confirmation of *B.*, and after the death of *A.*, it was the lease of *B.* and the confirmation of *A.*, but not a joint demise.^d The demise must be consistent with the title of the plaintiff.

* 11 G. IV, 1 W. IV, c. 70, s. 36. This statute applies only to issuable terms. *Doe v. Roe*, 2 C. & J. 133. Where the right of entry accrued the day after the *essoign* day of Trinity Term, it was held, that the lessor was not entitled to serve a declaration in ejectment as of that term. *Doe v. Roe*, 1 Dowl. 79. So where the tenancy expired the day after the first day of Trinity Term, it was held not to be within the statute. *Doe d. Summerville v. Roe*, 4 M. & Scott, 747. (30 Eng. C. L. 364.) The statute does not apply to ejectments brought in Middlesex, only where the cause is to be tried at the assizes. *Doe d. Norris v. Roe*, 1 Dowl. 547. The waiver of the tenant, however, will enable the landlord to proceed with this action according to the provisions of the statute, in cases to which it does not strictly apply. *Doe d. Antrobus v. Jepson*, 3 B. & Ad. 402. (23 Eng. C. L. 104.) *Doe d. Ranklin v. Bindley*, 4 B. & Ad. 84. (24 Eng. C. L. 28.) Tidd N. P. 525.

The rule of M. T. 3 W. IV, *reg.* 15, by which every declaration is entitled of the proper court, and on the day of the month and year on which it is filed and delivered, does not apply to actions of ejectment. *Doe d. Evans v. Roe*, 2 Add. & Ell. 11. (29 Eng. C. L. 13.) *Doe d. Gillett v. Roe*, 1 C. M. & R. 19; nor does the rule H. T. 4 W. IV, which requires pleadings subsequent to the declaration to be delivered between the parties, apply to this action. *Doe d. Williams v. Williams*, 4 N. & M. 259. It was formerly usual for the declaration in ejectment, by *original*, to repeat the whole of the original writ; but now by rule H. T. 2 W. IV, *reg.* 4, it will be sufficient to state the nature of the action, thus, "*A. B.* was attached to answer *C. D.* in a plea of trespass, or in a plea of trespass and ejectment, or as the case may be; and any further statement shall not be allowed in costs."

^b *Doe d. Goodwin v. Roe*, 3 Dowl. 323.

* B. N. P. 107.

^d *Treport's Case*, 6 Co. 75, b.

(1) (As to the demise see *Doe v. Butler*, 3 Wend. 149. *Siglar v. Van Riper*, 10 Wend. 414. *Magruder v. Peters*, 4 Gill & Johns. 323. *Lessee of Binney v. The Chesapeake and Ohio Canal Co.* 8 Peters, 214.)

Joint tenants, or parceners, being seised *per my et per tout*, have a sufficient interest in the premises to entitle them to make a joint demise; therefore, they may allege a joint demise in the declaration.* It is not, however, compulsory upon them, for one joint tenant or parcener may bring ejectment, without joining his companion in the demise, and he may recover his separate moiety; for a severance of the tenancy is thereby created; and if they all join in the action, and declare upon several demises by each, they may recover the whole premises.^b

*881
When tenants in common sue.

*But, as tenants in common have several and distinct titles, they cannot maintain ejectment on a joint lease of the whole premises; a separate demise must be laid for each; or they may join in a lease to a third person, and the declaration may state a demise by such lessee.^c A count in ejectment laying a joint demise by two, is not supported by proving the two to be entitled as tenants in common.^d When the declaration alleges a separate demise by each, it may be alleged generally to be of the whole premises demanded; for under a demise of the whole an undivided moiety may be recovered.^e

When any doubt exists as to the party in whom the legal title is vested, it is usual to declare upon several distinct demises, by several persons concerned in interest; and the claimant will be allowed to insert at the trial any demise included in the declaration; and it is always adviseable, where trustees are lessors, to lay separate demises, by the trustees and *cestui que trust*, unless the effect of the statute of uses on the trust be very clear.^f But if demises be inserted in the name of parties without their permission, the court will, on motion, order such demises to be struck out, or it will set aside the proceedings after verdict.^g

Husband and wife.

If the right of entry be in husband and wife, in right of the wife, the demise may be alleged to be by husband and wife, or by the husband alone.^h When a pauper has been left in pos-

* Boner v. Juner, Lord Raym. 726. Morris v. Barry, 1 Wils. 1. Heatherly d. Worthington v. Weston, 2 Wils. 232.

^b Doe d. Lulham v. Fenn, 3 Camp. 190. Doe d. Marsack v. Read, 12 East. 57. Doe d. Raper v. Lonsdale, *id.* 39. Where, by an underlease, power was reserved, on non-payment of rent, "to the lessors and the original lessor" to enter; held, that the demise was properly laid to be by the lessors alone, and that it need not be a joint demise by the lessors and the original lessor. Doe d. Bedford v. White, 4 Bing. 276. (13 Eng. C. L. 432.)

^c Heatherly d. Worthington v. Weston, 2 Wils. 232. Mantle v. Wollington, Cro. Jac. 166.

^d Doe d. Poole v. Errington, 1 Ad. & Ell. 750. (28 Eng. C. L. 197.) 3 N. & M. 646.

^e Doe d. Briant v. Wippel, 1 Esp. 330. Denn d. Burgess v. Purvis, 1 Burr. 326.

^f Adams, 211.

^g Doe d. Shepherd v. Rose, 2 Chitty, 171. (18 Eng. C. L. 289.) Doe d. Hammock v. Fellis, *id.* 170. (18 Eng. C. L. 288.) But the court refused, at the instance of the defendant, to interfere against a plaintiff who laid a demise by the assignees of a bankrupt without their permission; they having given up the property to the bankrupt, and the plaintiff claiming under him. Doe d. Vine v. Figgins, 3 Taunt. 440.

^h Gardiner v. Norman, Cro. Jac. 617.

session of premises by the overseers of a parish, the demise should be laid by the overseers for the time being, when the ejectment is brought, if the pauper has done any act recognising "a holding under them; otherwise by the overseers who let him into possession, or the last set whom he has acknowledged." Where a declaration in ejectment by the churchwardens and overseers contained two sets of counts, one describing them by their *office*, without their *names*, and the other by their *names* without their *office*; it was held, that the objection, if any, was cured after verdict.^b

*882

4.—*How the demise should be laid in respect to time.*] The demise The day upon which the demise is laid in the declaration, must be subsequent to the time when the lessor's right of entry accrues; for if the lessor has not a right to enter, he cannot have a right to demise the lands; therefore, if the demise be laid before the right of entry has accrued, the plaintiff must be nonsuited.^c It is usual, however, to lay the day as far back as possible, with a view to the recovery of the mesne profits.^d A demise by an heir, on the day of the death of his ancestor, is good; for the ancestor might die at five o'clock, the heir enter at six, and make a lease at seven.^e In ejectment, at the suit of the assignees of a bankrupt, the demise must be laid after the execution of bargain and sale by the commissioners to the assignees.^f

The demise should be laid after the plaintiff's title has accrued.

The conveyance of an insolvent's property by the clerk of the peace, does not vest the estate in the creditor by relation either to the date of the order or the conveyance, but only from the actual execution of such conveyance by the clerk of the peace: therefore such creditor cannot recover in ejectment upon a demise laid before the execution, though after the estate was out of the insolvent, and the order was made to convey the same to the lessor of the plaintiff.^g

An executrix may lay a demise in ejectment before probate granted.^h And so may an administrator, before administration, "provided it be after the death of the intestate." In the case of a copyhold, the demise may be laid against all persons but the lord, on a day between the surrender and admittance.ⁱ When an ejectment is brought against a tenant at will, the demise must be laid subsequently to the time when the possession is demanded, that is to say, subsequently to the determination of

*883

^a Doe d. Grundy v. Clarke, 14 East, 488. 3 Camp. 447.

^b Doe d. Orleton v. Harpur, 2 D. & R. 708. (16 Eng. C. L. 116.)

^c Goodtitle d. Galloway v. Herbert, 4 T. R. 689. Adams, 612. Ran. 239.

^d Id. B. N. P. 87.

^e Roe d. Wrangham v. Hersey, 3 Wils. 274.

^f Doe d. Esdaile v. Mitchell, 2 M. & S. 446.

^g Doe d. Whately v. Telling, 2 East, 257.

^h Roe d. Bendall v. Summersett, 2 Black. 694.

ⁱ S. N. P. 708.

^j Doe d. Bennington v. Hall, 16 East, 208.

the will. Therefore where possession was demanded on the 5th of October, and the demise was laid on the 1st; it was held bad, the tenancy not having been determined until after the day of the demise laid in the declaration.^a

Where a fine has been levied.

Where a fine has been levied with proclamations, and an actual entry is necessary to avoid it, the demise must be laid after such entry.^b But where the plaintiff's lessor entered, and afterwards levied a fine, and then an ejectment was brought, and the demise laid before the fine, it was held well enough.^c

In ejectment for a forfeiture on a lease, containing the usual clause of re-entry, and a covenant generally to repair, with a further covenant within three months after notice, to repair the defects pointed out in a notice, the demise may be laid before the expiration of the three months.^d

Where a sequestration of glebe land was published after the expiration of a notice to quit, a demise by the rector laid on a day subsequent to the expiration of the notice and preceding the publication was held to be good, though the bishop had previously indorsed the writ, "let sequestration issue."^e

Where an ejectment is founded on 4 Geo. II, c. 28, s. 2, the day of the demise must be subsequently to the last day on which the rent is payable, to save the forfeiture, and prior to the day on which the declaration is delivered.^f

*884

It is not necessary to lay any day certain upon which the plaintiff entered; it is sufficient to lay the demise after the title accrued, and then say in general that he entered.^g Nor is it necessary to state any particular day of ouster in the declaration, provided it appears to be subsequent to the commencement of the term and before the action was brought.^h But it is usual and more advisable to mention a particular day.ⁱ

Term upon which the plaintiff declares.

The number of years that the premises are alleged in the declaration to have been demised is immaterial; it is usual to insert *seven* years, if the demise be recent; a sufficient number of years, however, should be inserted so as to extend beyond the time when final judgment may be obtained, and admit of the lessor's recovering possession before their expiration. The courts, however, are very liberal in allowing lessors to amend in this respect.^j The length of the term is, however, wholly unconnected with the title of the claimant and may be

^a Goodtitle d. Galloway v. Herbert, *supra*, 882.

^b R. v. Walker, 7 T. R. 433.

^c Musgrave d. Hilton v. Shelley, 1 Wils. 214.

^d Roe d. Goatley v. Paine, 2 Camp. 520. Ellenborough. And see Horsfall v. Testar, 1 Moore, 89. 7 Taunt. 385. (2 Eng. C. L. 146.)

^e Doe d. Morgan v. Bluck, 3 Camp. 447. Ellenborough.

^f Doe d. Lawrence v. Shawcross, 3 B. & C. 752. (10 Eng. C. L. 223.)

^g 2 Roll. 466. 2 Ch. Pl. 626.

^h Merrell v. Smith, Cro. Jac. 311.

ⁱ Adams, 224.

^j Adams, 215. 2 Ch. Pl. 626. Run. 264. S. N. P. 709.

of longer duration than his interest in the land for the plaintiff shall recover according to what his title really is. Hence, a tenant from year to year may declare on a demise for seven years.^a

5.—*Of the locality of the premises.*] It is not necessary to state in the declaration, that the premises are situated in a parish, hamlet, &c.; it is sufficient to mention the name of the place in which they are situate without also describing it by the name of its ecclesiastical or civil division.^b And in one case, where even the name of the place was omitted when describing the premises, but such name could be collected from other parts of the declaration, the court held the description to be sufficiently certain.^c If, however, the premises be described as lying in a parish or hamlet, the description must be correct. An uncertain or improper description will be fatal.^d When the *premises lie in different parishes, it has been usual to enumerate the whole as lying in one parish, and to repeat the description of them as lying in the other parish; but it seems sufficient to enumerate them once only, describing them as lying in the parishes of *A.* and *B.*, or in *A.* and *B.* respectively.^e But it is not necessary to aver the premises to be in a parish; if they are described as being in the parish of *A.* and *B.* the court will construe it to mean part in the parish of *A.* and part in *B.*; *B.* being the name of a parish.^f Where the premises were described as in the parish of Westbury, and it was proved that there were two parishes of Westbury, viz. Westbury-on-Trym, and Westbury-on-Severn; held, that this was not a variance.^g So where the premises were stated to be in Farnham, and proved to be in Farnham Royal; held not to be a fatal variance unless it were shown that there were two Farnhams.^h So where the premises were stated to be in the parish of Saint Luke, in the county of Middlesex, there being two parishes of Saint Luke in that county, the one Saint Luke, Chelsea, and the other Saint Luke, Old Street, or more commonly called, Saint Luke, Middlesex; it was held not to be a fatal variance.ⁱ

*885
Variance
in the de-
scription
of the pre-
mises.

But where the premises were described as being in the united parishes of Saint George's the Martyr, and Saint George's Bloomsbury, and were proved to be situated in Saint George's

^a Doe d. Shore v. Porter, 3 T. R. 13. Bedford d. Carruther v. Dendien, B. N. P. 106.

^b Adams, 218.

^c *Id.* Goodright d. Smallwood v. Strother, 2 Black. 706.

^d Goodright v. Fawson, 7 Mod. 457. But where, in ejectment, the parish was misstated, the judge at the trial allowed it to be amended. Doe d. Marriott v. Edwards, 6 C. & P. 208. (25 Eng. C. L. 359.) 1 M. & Rob. 219.

^e 2 Ch. Pl. 626. Adams, 220.

^f Goodtitle d. Brembridge v. Walter, 4 Taunt. 671.

^g Doe d. James v. Harris, 5 M. & S. 326.

^h Doe d. Tollett v. Salter, 13 East, 9.

ⁱ Doe d. Boys v. Carter, 1 Y. & J. 492.

Bloombury, only; the variance was held to be fatal, although the parishes were united by act of parliament, for the purpose of a joint provision for the poor.^a In a recent case, the omission of all local description of the tenement demised was considered error, though the county and the vill in which the demise was made were stated in the declaration, the court however, pending the rule to arrest judgment on the ground of such error, allowed the plaintiff to amend.^b

*886
The quantity and description of the premises.

*6.—*Description of the premises.*] The quantity of the land declared upon need not correspond with that which the plaintiff claims.⁽¹⁾ He may declare for an indefinite number of messuages, as a thousand acres of arable land, or a thousand acres of pasture land, &c., and he will recover according to the quantity to which he proves title. Care, however, should be taken that the number specified in the declaration be larger than the number claimed, for though he may recover less than he claims, he cannot recover more.^c Upon the the same principle, if the lessor of the plaintiff be entitled to a moiety, or other part, of an entire thing, as the half, or third part, of a house, he may recover such moiety, or third part, on a demand for the whole.^d

The nature of the land, whether pasture or meadow land, should be distinctly set forth, for land in its legal acceptation signifies arable land.^e Where the plaintiff declared for five closes of arable and pasture, called —, containing twenty acres in *D.*, and had a verdict, judgment was arrested because it did not appear how much there was of each sort of land.^f

The notice to appear should be directed to the tenant.

7.—*Notice to appear and the requisites thereof.*] We have seen^g that a notice to the tenant in possession, from the casual ejector to appear, &c., is subscribed to the declaration. It is observable that such notice should be directed to the tenant both by his Christian and surname.^h A misnomer, however, in that respect will not be fatal if the service be otherwise regular.ⁱ Where the Christian name was omitted through the conduct of the tenant and his wife, it was held not to vitiate the notice.^j Where the notice was directed to *John B. Jones*,

^a Goodtitle d. Pinsent v. Lammiman, 2 Camp. 274, 6 Esp. 128.

^b Doe d. Rogers v. Bath, 2 N. & M. 440. (28 Eng. C. L. 369.)

^c Denn d. Burgis v. Purvis, 1 Burr. 326. Guy v. Rand, Cro. Eliz. 13.

^d Ablett v. Skinner, 1 Siderf. 229. Goodwin v. Blackman, 3 Lev. 334.

^e Massey v. Rice, Cowp. 346. Adams, 28. 2 Ch. Pl. 626, ante, 826.

^f Knight v. Syms, 1 Salk. 254. ^g Ante, 822.

^h Doe d. — v. Roe, 1 Chitty, 573. (18 Eng. C. L. 166.) Doe v. Hurst, id. 162. (18 Eng. C. L. 57.) Doe v. Roe, 1 Moore, 113. (4 Eng. C. L. 391.) 2 Ch. Pl. 627. A notice addressed to Mrs. Hicks, has been held insufficient. Adams, 229.

ⁱ Doe d. Folkes v. Roe, 2 Dowl. 567. Doe d. Frost v. Roe, 1 H. & W. 217.

^j Doe d. Warne v. Roe, 2 Dowl. 517.

(1) (As to the description see *Harrison v. Stevens*, 12 Wend. 170. *Bear v. Snyder*, 11 Wend. 592. *Barclay v. Howell's Lessee*, 6 Petcrs. 498. *Brooks v. Tyler*, 2 Verm. 348.)

instead of *John Benjamin Jones*, it was held sufficient.^a If there be several tenants, it is sufficient to direct the notice to the individual tenant who is served, though it is sometimes addressed to them all.^b

*887

And where the address to the tenant was altogether omitted, it was held sufficient, it having been stated in the affidavit of service that the tenant was duly served with a copy of the declaration.^c

The notice must require the tenant to appear and apply to the court to be admitted to defend instead of the casual ejector, within a certain time; and when the provisions of 1 Geo. IV, c. 89, s. 1, are resorted to, the notice should inform the tenant that he will be required to enter into recognisances to pay the costs and damages. But it need not set out at length what the tenant will be required to do, it will be sufficient if it requires him to appear and find bail if ordered by the court, and for such purposes as are specified in the statute.^d The time when the defendant should be required to appear is regulated by the locality of the premises, except when the proceedings are under the above statute, when he is required to appear within ten days after the delivery of the declaration. In other cases, when the premises are situated in London or Middlesex, the notice should be for the tenant to appear "on the first day," or "within the first four days" of the term next after the delivery of the declaration. Notice to appear, *generally*, of the term will, however, be sufficient; and the tenant will then have the whole term to appear in. When the premises are situated in any other county than London or Middlesex, the notice should require the tenant to appear generally in the term next ensuing.^e

Time of appearance.

The notice should specify the term by name in which the tenant is to appear; where, however, the notice had been given by mistake for Hilary instead of Trinity term, and the tenant was afterwards informed of the mistake, a rule nisi for judgment against the casual ejector was granted.^f But where the notice was to appear in eight days of Saint Hilary, instead of Hilary term generally, the court refused the rule.^g But where a declaration was delivered in Hilary vacation, entitled of Easter term, and the notice was to appear on the first day of next term; it was held sufficient, for the tenant would not be misled by the wrong title, so as to imagine that he had to Trinity term to appear.^h Where a notice was served before term,

*888

^a *Anon.* 1 Chitty, 573, a. (18 Eng. C. L. 166.)

^b *Doe d. Field v. Roe*, 1 H. & W. 516. *Doe d. Burton v. Roe*, 7 T. R. 477.

^c *Doe d. Pearson v. Roe*, 5 Moore, 73. (16 Eng. C. L. 390.)

^d *Doe d. Beard v. Roe*, 2 Gale, 48. 1 Mees. & Wels. 360. 2 Ch. Pl. 627.

^e *Id.*

^f *Anon.* 2 Chitty, 171. (18 Eng. C. L. 289.) *Doe v. Greaves*, *id.* 172. (18 Eng. C. L. 289.)

^g *Lackland d. Dowling v. Badland*, 8 Moore, 79. (17 Eng. C. L. 102.)

^h *Anon.* Adams, 232. And see *Goodtitle d. Ranger v. Roe*, 2 Chitty, 172. (18 Eng. C. L. 289.)

omitting to state the term in which the tenant was to appear, it was held sufficient.^a But where the notice was to appear "in due time," it was held to be insufficient.^b So where the declaration was entitled in the King's Bench, and the notice was to appear in the Common Pleas, it was held to be insufficient.^c Yet where the declaration was by original, and the notice was as if by bill, omitting "wheresoever," &c., the variance was held to be immaterial.^d

Strictly, the notice should be signed by the casual ejector; but it is sufficient if it be subscribed with the name of the plaintiff, or of any other person.^e But in proceedings under 1 Geo. IV, c. 87, the notice should be signed by the landlord himself.^f

Where the notice omitted to state that the consequence of the action not being defended will be turning the tenant out of possession; it was held to be defective, but the court allowed it to be amended on terms.^g

*889

*SECTION VIII.

SERVICE OF THE DECLARATION.

Service should be on the tenant personally, or on his wife at his residence. THE declaration should be served on the *tenant in possession*, and the nature and contents of it explained to him at the same time; if there be an under-tenant, it is not sufficient to serve the lessee or original tenant; for regularly the service must be on the tenant in possession.^h But the service need not be on the premises; if there be a personal service, it is immaterial in what place it is effected.ⁱ If the tenant be absent, or from any other circumstances cannot be personally served, service on his wife upon the premises, or at his house elsewhere,

^a Doe d. Roe, 1 C. & J. 330.

^b Doe d. Isherwood v. Roe, 2 N. & M. 476. (28 Eng. C. L. 371.) *Nom.* Forbes v. Roe, 2 Dowl. 420.

^c Doe d. Bird v. Roe, Barnes, 172.

^d Doe d. Thomas v. Roe, 2 Chitty, 171. (18 Eng. C. L. 289.)

^e Peaceable v. Troublesome, Barnes, 172. Hazlewood d. Price v. Thatcher, 3 T. R. 351. Goodtitle d. Duke of Norfolk v. Nottle, 5 B. & A. 849. (7 Eng. C. L. 279.)

^f *Anon.* 1 D. & R. 435, n. See Doe d. Bass v. Roe, 7 T. R. 469, as to amending notice.

^g Doe d. Darwent v. Roe, 3 Dowl. 336.

^h Doe d. Lord Darlington v. Cock, 4 B. & C. 259. (10 Eng. C. L. 325.) But if the service be on the original tenant, and he pleads, he cannot afterwards release himself from the action, on the ground, that his undertenants are in possession. Roe v. Wigge, 2 N. R. 330. Service on the person in possession is not sufficient, unless he be *tenant*. Tidd's Prac. 443.

ⁱ Savage v. Dent, Stra. 1064. Taylor v. Jeffs, 11 Mod. 304.

will be sufficient, if it appears that she lived with her husband; for the court will presume under such circumstances that the tenant had notice.^a But if the service be made on the wife not on the premises, it is insufficient, unless it be stated that she lived with her husband.^b If the service be not on the tenant personally, or on his wife, upon the premises, but upon some other party or in some other manner, the courts have a discretionary power respecting it, and it will be deemed sufficient or otherwise, according to the particular circumstances of the case. If, on the facts being disclosed in an affidavit of service, on moving for judgment against the casual ejector, the court are satisfied that notice of the declaration had reached the tenant, they will make the rule absolute, under other circumstances they will grant a rule *nisi*.⁽¹⁾

Though service on the wife of the tenant in possession on the premises, is sufficient; yet the mere acknowledgment of the wife that she had received the declaration, is not sufficient;^c and where the declaration and notice in ejectment "were nailed upon the door of the premises, and the wife called upon the person who had attempted to serve the process, requesting to know what she was to do with the paper; and he explained it to her and desired her to go to the plaintiff's attorney; she replied that she would see her husband immediately and recommend him to do it; held, that this was not a sufficient service.^d So service on the wife, without stating that it was served at the husband's house or premises, is insufficient.^e So service on a woman on the premises representing herself to be the wife, without stating deponent's belief that she was so, is insufficient.^f But if the deponent stated that he believed her to be the wife, it would be good.^g

Where the declaration was left in a shop where the wife was, who refused to hear it read, and went out and shut the door after her; it was held a sufficient service.^h So, where the wife refused to take the declaration, and the person serving it left it on the table, after having explained the nature of it, and she threw it after him, and he picked it up and affixed it on the most conspicuous part of the premises; it was held sufficient.ⁱ

But where the affidavit of service stated that it had been left

^a Goodright d. Waddington v. Thrustout, 2 Bl. 800. Doe d. Morland v. Bayliss. Doe d. Lord Southampton v. Roe, 1 Hodges, 24. Adams, 236.

^b Jenny d. Preston v. Cutts, 1 N. R. 308. Doe d. Williams v. Roe, 2 Dowl. 89.

^c Goodtitle d. Read v. Badtittle, 1 B. & P. 384.

^d Doe d. Briggs v. Roe, 2 C. & J. 202. 1 Dowl. 312.

^e Right d. Bomsall v. Wrong, 2 D. & R. 84. (16 Eng. C. L. 75.)

^f Doe d. Simmons v. Roe, 1 Chitt. 228. (18 Eng. C. L. 69.)

^g Doe d. Walker v. Roe, 4 M. & P. 11. ^h Doe d. Neale v. Roe, 2 Wils. 263.

ⁱ Doe d. Courthorpe v. Roe, 2 Dowl. 440.

(1) (As to the service, see West v. Talman, 4 Wash. C. C. R. 200. Traer v. Bowman, 3 Penn. 70. Jackson v. Salisbury, 3 Wend. 430. Evans v. Moran, 12 Wend. 180.)

with the wife of the tenant in possession, the husband having absconded, it was held to be insufficient.^a

Service
upon a
servant.

Service upon a member of the family, or upon a servant of the tenant upon the premises, will be sufficient, provided it appears from the acknowledgment of the tenant or otherwise, that he had received the declaration, or that he was aware of the service in due time.^b But such service will not be sufficient, unless it appears that the declaration reached the hands of the tenant, or that he was made acquainted with it before the term.^c

*891

Service on
members
of the
family.

*Where there was service on the daughter of the tenant in possession, and he on the first day of term acknowledged the receipt of the declaration, but not that he had received it before the term; held that it was not sufficient.^d For an acknowledgment of the tenant is not sufficient unless it appears by such acknowledgment that the declaration was received before the term.^e But where the tenant was ill, service on his daughter, on the premises, who said that she had explained the declaration to her father, was held sufficient.^f Yet where the service was on the son, who accepted it, and said he knew what it was for, and would deliver it over to his father; it was held to be insufficient, though the father and the son were attorneys.^g So where a tenant in possession was very unwell, and afterwards died, and a declaration in ejectment was served on a person at the house where he was staying on the day of his death; it was held not to be a good service.^h

Where the
tenant
keeps out
of the way

Where the tenant was clearly keeping out of the way to avoid service, a rule was granted to show cause why service on the son upon the premises was not sufficient.ⁱ So, on his agent;^j so, on the person who kept the key of the premises;^k so, by merely sticking the declaration on the premises, which were vacant.^l

Where several ineffectual attempts were made to serve the tenant, and on the occasion of the last of which the servant admitted that the tenant was in the house, but refused to let the party see him, and the declaration was then delivered to the servant, it was held sufficient.^m So where, after several

^a Doe d. Harrison v. Roe, 10 Price, 30.

^b Doe d. Tindall v. Ree, 2 Chitt. 180. (18 Eng. C. L. 293.) Doe v. Roe, 5 B. & C. 764. (12 Eng. C. L. 373.) Doe d. Macdougall v. Roe, 4 Moore, 20. (16 Eng. C. L. 360.) Jenny d. Mills v. Cutts, 1 Scott, 52. Doe d. Mortlake v. Roe, 2 Dowl. 444.

^c Doe v. Roe, 2 Dowl. 414. Doe d. Brittlebank v. Roe, 4 M. & Scott, 569. (30 Eng. C. L. 361.) Doe d. Pugh v. Roe, 1 Scott, 464. 1 Hodges, 6. Right d. Freeman v. Roe, 2 Ch. 180. Doe d. George v. Roe, 3 Dowl. 9.

^d Doe d. Harris v. Roe, 1 Harr. & Woll. 372.

^e Doe d. Marshall v. Roe, 2 Ad. & Ell. 588. (29 Eng. C. L. 163.)

^f Doe d. Cockburn v. Roe, 1 Dowl. 692. ^g Anon. Woodfall by Harr. 791.

^h Doe d. Hartford v. Roe, 1 Harr. & Woll. 352.

ⁱ Doe d. Luff v. Roe, 3 Dowl. 575.

^j Doe d. Childers v. Roe, 2 H. & W. 121.

^k Doe d. Smith v. Roe, 1 W. W. & Dav. 69.

^l Doe d. Harvey v. Roe, 2 Price, 112.

^m Doe d. Morpeth v. Roe, 3 Dowl. 577

ineffectual attempts to serve the tenant, the person trying to serve gave the declaration to the servant, with a proper explanation, "which declaration he afterwards saw in the hands of the tenant's attorney; it was held to be sufficient." *892

Where service was made at a house where it was sworn it was believed the tenant was, but was denied for the purpose of avoiding the service, the court granted a rule *nisi* for judgment against the casual ejector.^b So a rule *nisi* was granted where there was service on the wife of a brother of the tenant on the premises, who afterwards said she should go and see the tenant, and she next day left the premises.^c So where the service had been by leaving the declaration with the turnkey of the prison in which the tenant in possession was confined, with directions to give it to him, and the tenant had acknowledged that he had received it before the first day of the term; it was held to be sufficient.^d A rule that the service on the son of the tenant should be good service, was made absolute, where the affidavit of the tenant, on showing cause, did not deny having received the declaration from his son.^e

If the service be on any person on the premises, an acknowledgment by the tenant that he had received the declaration *before the first day of the term*, will be sufficient; but such acknowledgment must be decisive of the declaration having been received before that day.^f An acknowledgment by tenant of the receipt of the declaration made on the first day of term, 12th Jan., but not saying when it was received, was held not to be sufficient to make good a service on his son on the 10th January.^g

When an acknowledgment by the tenant of having received the declaration will be sufficient.

Where the service was on a servant on a Saturday, and the tenant acknowledged that he had received it on the *Sunday*, it was considered insufficient, for service on a *Sunday* is invalid.^h An acknowledgment by the wife that she had received the declaration is not binding on the husband.ⁱ But a service "on the servant, with an acknowledgment of the tenant's attorney that he had received the declaration, is sufficient."^j So is service on the daughter before the term, with an acknowledgment of the tenant within the term.^k So is an acknowledgment of the receipt of the declaration in a letter by the tenant, dated on the first day of the term.^l So is an acknow-

*893

^a Doe v. Roe, 2 Dowl. 182.

^b Doe d. Turncroft v. Roe, 1 Harr. & Woll. 371.

^c Doe d. Hubbard v. Roe, 1 Harr. & Woll. 371.

^d Doe d. Harris v. Roe, 2 Dowl. 607.

^e Doe d. Watts v. Roe, 1 Harr. & Woll. 199.

^f Doe d. Harris v. Roe, 1 H. & W. 372. Doe d. Hamabrook v. Roe, 14 East, 441.

^g Doe d. Martin v. Roe, 1 Harr. & Woll. 46. 4 N. & M. 553.

^h Doe v. Roe, 5 B. & C. 764. (12 Eng. C. L. 373.)

ⁱ Doe d. Tucker v. Roe, 2 Dowl. 775. 4 M. & Scott, 165. (30 Eng. C. L. 344.)

^j Doe d. Teverell v. Snee, 2 D. & R. 5. (16 Eng. C. L. 63.)

^k Doe d. Smith v. Roe, 4 Dowl. 265.

^l Doe d. Notting v. Roe, 1 W. W. & Dav. 69.

ledgment by a letter, dated the day before term, and received the second day in term.^a

Where the tenant is personated.

Where a tenant in possession was personated, at the time of service, by another, who accepted the service in his name, it was held to be a good service on the tenant himself.^b Service in the name of the tenant, on a person representing himself to be in possession for another, then temporarily absent, and who afterwards acknowledged an appraisal of the service, was held to be sufficient.^c But service on a person whom the deponent believed to be the tenant in possession, was deemed bad, the notice not being addressed to such person.^d

Where the tenant keeps out of the way or refuses to receive the declaration.

Where the tenant absconds, or keeps out of the way, or does any act implying a resolution not to receive the declaration, on an affidavit of these facts, the court will allow a service to be good which otherwise would be irregular;^e as where on a tender of the declaration, the tenant refused to receive it, but ran away, and threatened to shoot the person serving it if he came near him; it was held to be sufficient.^f So where the declaration was read to the tenant, who refused to take it, whereupon it was served on his son.^g

*394

A rule for judgment against the casual ejector, was made absolute on an affidavit which stated that the service of the declaration had been made on a person believed to have been left in possession by the tenant, who was out of the way, and also on his attorney; and that a letter was sent by the two-penny post, according to the attorney's direction to the tenant's last place of abode.^h So, a rule for judgment against the casual ejector was granted, on an affidavit stating that the deponent had heard a person read and explain the declaration in another room to some one, whom he was told was the tenant, and was bedridden.ⁱ

But where a tenant in possession left this country and resided abroad for the purpose of avoiding his creditors, and the premises were charged with an annuity to the lessor of the plaintiff, to whom a right was reserved to enter, receive the rents, and sell; it was held that an affidavit that the declaration was duly served on the premises, and a copy thereof affixed to the outer door, was not sufficient; and that the service of the declaration on the solicitor of such tenant was not good, unless he resided abroad for the express purpose of avoiding such service.^j

Service by nailing the declaration on the barn-door of the

^a *Id.*

^b *Denn d. Tyrrell v. Denn*, 2 Burr. 1181.

^c *Doe d. Walker v. Roe*, 1 Price, 399.

^d *Doe v. Roe*, 2 Tyr. 280. *Doe v. Badtittle*, 1 Chitty, 215. (18 Eng. C. L. 68.)

^e *Doe d. Luff v. Roe*. *Doe d. Childers v. Roe*, *ante*, 891.

^f *Doe d. Wills v. Roe*, 3 Dowl. 582. *Doe d. Courthorpe v. Roe*, *ante*, 890.

^g *Doe d. Grimes v. Roe*, 1 H. & W. 671.

^h *Anon.* 2 Chitty, 179. (18 Eng. C. L. 293.)

ⁱ *Doe d. Tucker v. Roe*, 1 Harr. & Woll. 671.

^j *Roe d. Fenwick v. Doe*, 3 Moore, 576. (4 Eng. C. L. 434.)

premises, in which barn the tenant had occasionally slept, (there being no dwelling-house, and the tenant not being to be found at his last place of abode,) was allowed to be good service.^a But sticking up a declaration in the gateway of the tenant's premises is not sufficient, unless it be sworn that the defendant kept out of the way to avoid being served.^b And service of the declaration on a servant of the tenant in possession was held to be insufficient, though the deponent swore to his belief, that the tenant kept out of the way to avoid being served.^c

Where no person resides on the premises.

Where the tenant is not on the premises, a distinction is taken between cases where he has *actually abandoned* them, and where, though he has *ceased to occupy them*, he still retains virtual possession. In the former case, the lessor must proceed as upon a vacant possession;^d in the latter he must proceed *in the ordinary way*, after having effected the best service of the declaration in his power.^e Where part of the property consisted of three unfinished houses, which were untenanted, and there was no property in them; the court held that the plaintiff should proceed as on a vacant possession.^f So where the tenant locked up the house and quitted it.^g But where the lessee of a public-house removed with his family to another house, leaving beer in the cellar, it was held that proceedings could not be taken as on a vacant possession.^h

* 895

Where a servant of the deceased tenant remains in possession, the plaintiff ought to endeavor to get possession; and if he resists, such servant may be treated as tenant, and the declaration may be served on him as such, and if he does not resist, the lessor may treat it as a vacant possession.ⁱ Where the premises consisted of a mansion, and four small houses in a yard, in one of which a man resided, who was placed there to take care of the premises, the court refused a motion to make a service on him good, but recommended to the plaintiff to affix a declaration on the empty houses, and then to move that it be deemed a good service.^j

Where a servant only resides on the premises.

Service on the executors of the late tenant in possession is bad, if it does not appear that they were the tenants in possession.^k Service on a person appointed by the Court of Chancery to manage an estate for an infant, is insufficient.^l The court granted a rule nisi to make the service of the declaration on the clerk of a public body (who was directed to be appoint-

^a Fenn d. Buckle v. Roe, 1 N. R. 293.

^b Anon. 1 Chitty, 505, n. (18 Eng. C. L. 148.)

^c Doe d. Jones v. Roe, 1 Chitty, 213. (18 Eng. C. L. 67.)

^d See ante, 855. * Woodf. Land. & Ten. 794.

^e Doe d. Schovell v. Roe, 2 C. M. & R. 42. 3 Dowl. 691.

^f Doe d. Darlington (Lord) v. Cock, 4 B. & C. 259. (10 Eng. C. L. 325.)

^g Savage v. Dent, 2 Stra. 1064.

^h Doe d. Atkins v. Rose, 2 Chitty, 179. (18 Eng. C. L. 293.)

ⁱ 1 Tidd's Prac. 443.

^j Doe d. Paul v. Hurst, 1 Chitty, 162. (18 Eng. C. L. 57.)

Goodtitle d. Roberts v. Badtitle, 1 B. & P. 385.

ed by an act of parliament) good service.^a A laborer, who does not pay rent, is an occupier on whom service of an ejectment is good.^b

- *896 *Where the service was upon a person who swore that he was not in possession of any part of the premises, the court ordered his name to be struck out of the appearance and consent rule, upon his undertaking to permit execution to issue for any part of which it might turn out he was in possession.^c Service on the lessee of premises which he usually underlet to weekly tenants, but which had been unoccupied for some time, was held good, for he might be considered as the tenant in possession.^d

When the tenant is abroad, service on his agent is sufficient.

The delivery of a declaration to an agent of a tenant in possession, who had resided abroad, and fixing a copy on the premises, has been held sufficient to entitle the plaintiff to judgment against the casual ejector.^e But service on an agent of a tenant, who was within the kingdom, was held not to be sufficient even for a rule *nisi*, for the tenant himself might have been served.^f And a rule for judgment against the casual ejector was refused, where it had been served on an agent of a mortgagor on the premises, and on his clerk at another place; for it did not appear that the mortgagor himself might not have been served.^g So service on the attorney of the mortgagee in possession, who undertook to appear for the latter, was held insufficient, without an acknowledgment by the mortgagee.^h

- *897 Service on the wife of the son of the tenant on the premises, was held to be sufficient to grant a rule *nisi*, where it appeared that the tenant was in America, and that his son managed his business.ⁱ Rule for judgment against the casual ejector was refused, where the house was found shut up three days before the term, and the declaration was fixed on the door, it appearing that the tenant was in the habit of shutting up the house and staying away for several days *together; it not having appeared that the tenant kept out of the way to avoid service.^j

Service by nailing the declaration on the barn-door of the premises, in which barn the tenant had occasionally slept, there being no dwelling-house, and the tenant not being found at his residence, was held to be good.^k

Where there are

If there be several tenants in possession, the declaration should be served on each of them.^l It has, however, been

^a *Anon.* 2 Chitty, 181. (18 Eng. C. L. 294.)

^b *Gulliver v. Swift*, 2 Lord Ken. 511.

^c *Doe d. Snape v. Snape*, 2 C. & J. 314. 1 Dowl. 314.

^d *Doe d. Hayne v. Roe*, 1 W. W. & Dav. 72.

^e *Doe v. Roe*, 4 B. & A. 653. (6 Eng. C. L. 555.) *Doe d. Treat v. Roe*, 1 H. & W. 526.

^f *Doe d. Tomkins v. Roe*, 1 W. W. & Dav. 49.

^g *Doe d. Sturch v. Roe*, 1 Har. & Woll. 672.

^h *Doe d. Collins v. Roe*, 1 Dowl. 613.

ⁱ *Doe d. Potter v. Roe*, 1 Hodges, 316.

^j *Doe d. Roupel v. Roe*, 1 Harr. & Woll. 367.

^k *Fenn d. Buckle v. Roe*, 1 N. R. 293.

^l B. N. P. 98.

held, that service on one of two joint-tenants was good for several both.^a And where the service was on one of three tenants in possession, but the affidavit did not state them to be joint-tenants, a rule *nisi* was granted.^b Service on one of two joint-tenants, who were also partners in trade, will entitle the plaintiff to a rule *nisi* only.^c Service on one of several partners in a firm, who were tenants, is good.^d But service on an under-tenant of part of the premises, cannot be considered as service on a joint-tenant.^e So where three sisters lived together, and there was service on one of them by delivery to the other two the day before term commenced, the court granted a rule *nisi*.^f If one part of the premises be vacant, and the other in the occupation of a tenant, it is sufficient to serve a copy of the declaration on the tenant who occupied the one part, and affix another copy on the door of that part which was vacant.^g Service on one only of two tenants, who said that the other was only his servant, is good.^h But service on the wife, or servant of one of several joint-tenants, is not good service upon all.ⁱ

When two or more tenants are in possession of the premises, *and it appears that one only has been served with the declaration, the court will grant the common rule against the party served, and a rule *nisi* against the other parties; but if the affidavit does not show such possession, the rule will be refused against all but those actually served.^j *898

Where ejectment was brought for a house which was rented by the parish, for the accommodation of the poor, service on the churchwardens and overseers was held to be sufficient.^k In ejectment for a chapel, the service may be on the chapel-wardens, or on the persons to whom the keys are intrusted.^l When the premises belong to the parish.

Where the tenant is a lunatic, service should be on his committee, and not upon the servant.^m Where service was on the person who had the care of the tenant, who was a lunatic, and the management of his affairs, it was considered sufficient.ⁿ Lunatic.

When the service is good for part, and bad for part, the lessor may recover those premises for which the service is good; but if he proceed for all, and obtain possession by good for part.

^a Doe d. Williamson v. Roe, 10 Moore, 493. (17 Eng. C. L. 154.)

^b Right d. — v. Wrong, 2 Chitty, 175.

^c Doe d. Field v. Roe, 2 Chitty, 174. (18 Eng. C. L. 290.)

^d Doe d. Tomkins v. Roe, 1 W. W. & Dav. 49.

^e Doe d. Childers v. Roe, 2 H. & W. 121.

^f Doe d. Grimes v. Roe, 1 Harr. & Woll. 369.

^g Doe d. Evans v. Roe, 4 Moore, 469. (16 Eng. C. L. 381.)

^h 1 W. W. & Dav. 75.

ⁱ Doe d. Godlin, Woodf. by Harr. 788. Anon. 1 Chitty, 121.

^j Adams, 237.

^k Id. 237. Tupper d. Moreen v. Doe, Barnes, 181.

^l Adams, 238. Run. 136. = Anon. Loft. 461.

^m Doe d. Lord Aylesbury v. Roe, 2 Chitty, 183. (18 Eng. C. L. 295.) 2 Sell. Prac. 174. Adams, 242.

means of a judgment against the casual ejector, the court will compel him to make restitution of that part, for which the service was bad.^a

At what time the declaration must be delivered.

Formerly the declaration must have been delivered before the essoign day of the term in which the notice was given to appear, otherwise the plaintiff could not have judgment till the next term; but now, by a general rule of all the courts, declarations in ejectment may be served before the "first day of any term; and thereupon the plaintiff shall be entitled to judgment against the casual ejector in like manner as upon declarations served before the essoign or first general return day."^b

*899

*SECTION IX.

OF THE AFFIDAVIT OF SERVICE.

WHEN the declaration has been served, an affidavit of the service must be made by the person who served it, or by a person who saw it served and heard it explained to the tenant in possession in order to obtain judgment against the casual ejector.^c But when the circumstances of the case are special the usual course is to move for a rule to show cause why the service should not be deemed good. This motion may be made even before the service, on an affidavit stating the circumstances that are likely to occur, and applying for a rule to show cause why service of such a nature should not be sufficient.^d

Requisites of the affidavit.

The affidavit may be sworn before a judge or a commissioner, and it is no objection that the commissioner is clerk to the attorney who makes the application.^e It may be made even before the attorney in the cause.^f It must be entitled in the cause and with the name of the casual ejector.^g The same particularity is not necessary in the title of an affidavit as in a declaration; it is sufficient to state the names of the lessors and not the frame of the demises.^h Therefore where the lessors of the plaintiff were described in the declaration as executors, it was held, that the affidavit might not notice their character in

^a *Id.*

^b R. Gen. T. T. 1 W. IV, reg. 8. 2 B. & Ad. 789. 7 Bing. 784. 1 C. & J. 472.

^c *Goodtitle d. Wanklen v. Badtittle*, 2 B. & P. 120. Where an affidavit was jointly made by the person who served the declaration on the housekeeper of the tenant, and the housekeeper, stating that she had delivered it to the tenant, the court granted a rule *nisi*. *Doe v. Roe*, 2 Dowl. 198.

^d *Adams*, 243. *Methold v. Noright*, 1 Bl. 290. *Gulliver v. Wagstaff*, *id.* 317.

^e *Doe d. Grant v. Roe*, 1 W. W. & Dav. 68.

^f *Doe d. Cooper v. Roe*, 2 Y. & Jer. 284.

^g *Anon.* 2 Chitty, 181. (18 Eng. C. L. 295.)

^h *Doe d. Banks v. Roe*, 1 Mur. & H. 3.

stating the name of the cause.^a An affidavit intituled "Doe, on the demise, &c.," instead of "demises," with the declaration annexed, was held good.^b But an affidavit intituled "Doe v. Roe," omitting the lessor's name, was held bad, though the declaration was annexed.^c

*The title of the affidavit is sufficient if it contains the names of all the lessors, without stating the demises with the same particularity as in the declaration.^d The affidavit must be clear and positive; unless when the service is executed under special circumstances it should state positively that the person served was the tenant in possession. An affidavit of service on *A. B.*, tenant in possession, or his wife, has been held to be insufficient.^e It has been held, however, that an affidavit of service on a person whom the deponent *believed* to be the tenant in possession was sufficient.^f But an affidavit which stated that the deponent believed that the party served held the premises which were sought to be recovered under a lease and that she did not underlet them, was held to be insufficient.^g So was an affidavit that he served the person in possession.^h So, that he served the occupier.ⁱ So was an affidavit that he served the wives of *A.* and *B.*, who, or one of them, were tenants in possession.^j The affidavit must not qualify the possession of the tenants in possession, by stating the service to be on them as executors.^k The affidavit of service on an administratrix must state that she is tenant in possession, and that the property is leasehold, the presumption of law being that it is freehold.^l

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What the affidavit must state

It should state that the nature of the declaration was explained.

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In an affidavit in the case of a vacant possession, where one copy of the declaration was sworn to have been fixed on the premises, and another served on the lessee, but not on the premises, it is necessary to state that such lessee was tenant in possession at the time of such service.^m The affidavit must also state that the notice was read or explained.ⁿ But if the tenant says he understands the nature and object of the service "it will be sufficient, without any statement of the reading or explanation."^o A rule *nisi* was granted, where it appeared

^a Doe d. Jenks v. Roe, 2 Dowl. 55.

^b Doe d. Walters v. Roe, 1 W. W. & Dav. 75.

^c *Id.*

^d Doe d. Banks v. Roe, 1 Mur. & Hur. 3.

^e Birbeck v. Hughes, Barnes, 173.

^f Doe d. George v. Roe, 3 Dowl. 22; but see Doe v. Badtittle, 1 Chitty, 215, (18 Eng. C. L. 68,) *contra*.

^g Doe d. Talbot v. Roe, 1 H. & W. 367.

^h Doe d. Robinson v. Roe, 1 Ch. 1110. Doe d. Oldham v. Roe, 4 Dowl. 714.

ⁱ Doe d. Jackson v. Roe, 4 Dowl. 609.

^j Harding d. Baker v. Greensmith. Bar. 174.

^k Doe v. Roe, 2 Tyr. 158. 2 C. & J. 45.

^l Doe d. Rigby v. Roe, 1 H. & W. 368.

^m Doe d. Seabrook v. Roe, 4 Moore, 350.

ⁿ Doe v. Roe, 1 Dowl. 428.

^o Doe d. Jones v. Roe, 1 Dowl. 518. Doe d. Thompson v. Roe, 2 Chitty, 186. (18 Eng. C. L. 297.) Doe d. Quintin v. Roe, Adams, 244. Doe d. Stone v. Roe, 3 Hodges, 14. Doe d. Downes v. Roe, 1 H. & W. 671.

Affidavit
of service
on wife or
servant.

When no
person is
in posses-
sion.

*902

from circumstances that the parties understood the contents of the declaration, though the affidavit did not state that it was explained to them.^a So where the declaration was put through an iron grating to the defendant, who was in Newgate.^b So where the declaration was put on a table before the defendant, but could not be delivered to him, as the defendant's son prevented the person from serving it.^c Service on the wife on the premises, and reading over the notice without explaining it, has been held sufficient.^d Where the service was on the servant of the tenant, and the affidavit did not state that the nature of it was explained to her, a rule *nisi* only was granted in the first instance.^e A *refusal* by the party served to hear the reading or explanation, is equivalent to a performance of that act.^f If the service be on the wife, the affidavit must state that it was on the premises or at the husband's house, or that the husband and wife were living together.^g If the service be on a servant or third person, the affidavit must state that the service was on the premises, and that the tenant had acknowledged the receipt of the declaration, or had been aware of the service before the first day of the term.^h

Where no person is in the house, and the service is effected by fixing the declaration on the premises, the affidavit must state deponent's belief that the tenant had absconded to avoid the service;ⁱ that the deponent had searched for the defendant *had used due means to find him out, and could not find him; and that a copy was left as well as affixed on the premises.^j An affidavit stating that the tenant had left the premises, but not stating that the lessor did not know where he was, was held to be insufficient.^k

^a *Anon.* 2 Chitty, 184. (18 Eng. C. L. 296.)

^b *Wright d. Bayley v. Wrong*, 2 Chitty, 185. (18 Eng. C. L. 297.)

^c *Anon.* 2 Chitty, 185. (18 Eng. C. L. 297.)

^d *Doe v. Roe*, 2 Dowl. 199.

^e *Anon.* 2 Chitty, 182. (18 Eng. C. L. 295.)

^f *Doe d. George v. Roe*, 3 Dowl. 541.

^g *Doe d. Briggs v. Roe*, 2 C. & J. 202. *Doe d. Williams v. Roe*, 2 Dowl. 89. *Doe d. Morland v. Bayliss*, 6 T. R. 765. *Jenny d. Preston v. Cutts*, 1 N. R. 308.

^h *Doe v. Roe*, 1 D. & R. 563. (16 Eng. C. L. 57.) *Doe d. Tindal v. Roe*, 2 Chit. 180. (18 Eng. C. L. 293.) *Roe d. Hambrook v. Doe*, 14 East, 441. See Reg. Gen. T. T. 1 W. IV, *ante*, 898.

ⁱ *Doe d. Lowe v. Roe*, 1 Chitty, 505. (18 Eng. C. L. 148.) *Doe d. Batson v. Roe*, 2 *id.* 176. (18 Eng. C. L. 291.)

^j *Doe d. Tarluy v. Roe*, 1 Ch. 505. (18 Eng. C. L. 149.) *Anon.* 2 Ch. 177. (18 Eng. C. L. 292.)

^k *Anon.* 1 Ch. 505. (18 Eng. C. L. 148.)

SECTION X.

JUDGMENT BY DEFAULT.

If the tenant or landlord does not appear in due time pursuant to the notice affixed to the declaration, and enter into the common rule to confess lease, entry, ouster and possession, the plaintiff may, upon an affidavit of service, as previously alluded to, move for judgment against the casual ejector by default, which, except when the service is made under special circumstances, is a motion *of course*, requiring only the signature of counsel. (1) The time for making this motion depends upon the locality of the premises, and the time when the notice requires the defendant to appear. In the King's Bench, if the premises are situated in London or Middlesex, and the notice requires the tenant to appear on the first day, or within the first four days of the next term, the motion for judgment against the casual ejector should regularly be made in the beginning of that term; and then the tenant must appear within four days, inclusive, after the motion, or the plaintiff will be entitled to judgment. If, however, the motion be deferred until the latter end of the term, the court will order the tenant to appear in two or three days, and sometimes immediately, that the plaintiff may proceed to trial at the sittings after term; but if the motion be not made before the last four days of the term, the tenant need not appear until two days before the essoign day of the subsequent term. In the Common Pleas, if the premises are situated in London or Middlesex, and the tenant has notice to appear in the beginning of the term, judgment against the casual ejector *must be moved for within one week next after the first day of every Michaelmas and Easter term, and within four days next after the first day of every Hilary and Trinity term; except, it seems, when the tenant has absconded, and the proceedings are upon the statute of 4 Geo. II, and then the motion may be made at any time during the term; because the motion of 32 Car. II, relates only to declarations in ejectment served upon tenants in possession.^a

When the plaintiff may move for judgment against the casual ejector.

*903

If one term is allowed to elapse between the service and the motion for judgment, a rule *nisi* only can be granted; for the party may have searched the office to see if judgment was obtained against him in the term after the notice, and finding it was not, he may suppose the proceedings were at an end.^b

^a Adams, 248. Reg. Trin. 32 Car. II, C. B. Doe d. Lawford v. Roe, 1 Bing. N. C. 161. (37 Eng. C. L. 341.)

^b Doe d. Wilson v. Roe, 4 Dowl. 124. Doe d. Thring v. Roe, 3 Hodges, 13. And the rule is the same in the Exchequer. Reeve v. Roe, 1 Gale, 15.

(1) (Where the tenant takes defence as to part, judgment should be taken against the casual ejector for the residue. Underwood ads. Jackson, 1 Wend. 95.)

When the premises are situated elsewhere than in London or Middlesex, or being situated in the latter places, the notice is to appear *generally* of the term, judgment must be moved for in all the courts during the term in which the notice is given to appear; and the appearance must be entered within four days next after the expiration of such term, whether it be an issuable term or not.^a But when the action is brought under the provisions of 1 W. IV, c. 70, s. 36, the tenant must in all cases enter his appearance within ten days after the delivery of the declaration.

When judgment against the casual ejector will be set aside.

After the expiration of the rule for judgment, the plaintiff may sign judgment against the casual ejector, and immediately sue out a writ of possession, and execute it in term or vacation.^b But judgments against the casual ejector irregularly obtained, will be set aside as a matter of course, and where they have been regularly obtained, the courts will set them aside; even after execution executed, upon an affidavit of merit or other circumstances which they may deem sufficient.^c(1)

*904

The court set aside a regular interlocutory judgment (signed *for want of appearance) and writ of possession executed, on an affidavit by the attorney, for the landlord and tenant, that he had received instructions for entering an appearance, but had neglected it, owing to matters personally affecting himself, which had prevented his attending to it.^d And an averment in the affidavit, that the deponent believed the parties to have a good defence to the action, was held to be sufficient without adding "*on the merits*."^e The court will, in some cases, in the exercise of their discretion, set aside a judgment against the casual ejector on terms, where the tenant has neglected to give notice to the landlord.^f But where judgment and execution in ejectment was regularly obtained without collusion with the tenants in possession, the court refused to set it aside at the instance of a party who stated that he was landlord of the premises, and had not received any notice of the declaration in ejectment.^g Yet in a more recent case, after a writ of possession executed, and an action for mesne profits commenced, the court set aside the judgment and execution on payment of all the costs incurred, at the instance of the landlord, who by the mistake of his wife had not had the copies of the declaration,

^a Reg. Gen. 4 B. & A. 539. 2 B. & B. 705. But see *Doe d. Greaves v. Roe*, 4 Dowl. 88, where it was held that this practice applies to country causes only.

^b Tidd, N. Prac. 627.

^c Adams, 252. *Doe v. Hedges*, 4 D. & R. 393. (16 Eng. C. L. 208.)

^d *Doe d. Shaw v. Roe*, 13 Price, 260. ^e *Id.*

^f *Doe d. Troughton v. Roe*, 4 Burr. 1996. *Doe d. Grocers' Co. v. Roe*, 5 Taunton, 205. (1 Eng. C. L. 78.) *Doe d. Ingram v. Roe*, 11 Price, 507. *Doe d. Meyrick v. Roe*, 2 C. & J. 682.

^g *Doe d. Martin v. Roe*, 1 Hodges. 223. 1 Scott, 181. And see *Goodtitle v. Badtitle*, 4 Taunt. 820.

(1) (*Popino v. M'Allister*, 4 Wash. C. C. Rep. 393.)

which had been served on his tenants, delivered to him.* The regular mode of setting aside such judgments is by rule of court, for the party having obtained the judgment to give up the possession; but if the circumstances of the case require it, the courts will order a writ of restitution to be issued.^b

*SECTION XI.

*905

APPEARANCE OF THE DEFENDANT, AND PROCEEDINGS THEREUPON.

	PAGE		PAGE
1. Who may appear to defend.		3. Consolidation of actions.	909
2. The consent rule.	907	4. Plea and issue.	910

1.—*Who may appear.*] HAVING considered the course to be pursued by the plaintiff when no appearance is entered, pursuant to the notice subscribed to the declaration, we shall now treat of the parties who may appear, and of the mode of proceeding when the action is defended.

We have seen that the tenant in possession is the party on whom the declaration must be served; and as it frequently happens that such tenant is an under-tenant to some other person to whom such service can afford no information of the proceedings, and even if the landlord had notice, according to the ancient practice he was not permitted to defend; whereby great inconvenience was occasioned to landlords when the tenants either through negligence or fraud omitted to appear themselves; to remedy which it was enacted by 2 Geo. II, c. 19, s. 12, "that every tenant on whom a declaration in ejectment shall be served, shall give notice thereof to his landlord, under the penalty of forfeiting the value of three years improved or rack rent of the premises to the landlord; to be recovered by action of debt."^c(1)

A tenant on being served with a declaration must give notice thereof to his landlord.

And sec. 13. enacts, "that it may be lawful for the court in which an ejectment is brought, to suffer the landlord to make

* Doe d. Butler v. Roe, 2 H. & W. 130.

^b Adams, 252. Davies d. Povey v. Doe, 2 Bl. 892.

^c This provision extends only to cases where the ejectments are inconsistent with the landlord's title. Therefore it does not apply to an ejectment by the mortgagee against a mortgagor. Buckley v. Buckley, 1 T. R. 647. The improved or rack rent here mentioned, is not the rent reserved, but such a rent as the landlord and tenant might fairly agree on at the time of delivering the declaration in ejectment, in case the premises were then to be let. Crocker v. Fothergill, 2 B. & A. 652.

(1) (Admission of Landlord. *McClay v. Benedict*, 1 Rawle, 424. *Stiles ad. Jackson*, 1 Wend. 103. *Stiles v. Jackson*, *ibid.* 316. *The People v. Webster*, 10 Wend. 554. *Doe v. Lanning*, 6 Halst. 185.)

Appearance by the landlord.

*906

himself defendant, by joining with the tenant, in case he shall appear; but in case such tenant shall refuse or neglect to appear, judgment shall be signed against the casual ejector for "want of such appearance; but if the landlord shall desire to appear by himself, and consent to enter into the like rule that by the course of the court the tenant in possession, in case he had appeared, ought to have done, then the court shall permit the landlord to do so, and order a stay of execution upon such judgment, against the casual ejector, until they shall make further order therein."^a In the construction of this section, the word *landlord* is extended to all persons claiming title consistent with the possession of the occupier; thus a devisee in trust, was permitted to defend;^b so an heir was, where the ancestor under whom he claimed had obtained the same rule just before his death.^c So was a mortgagee along with the mortgagor.^d But if the mortgagee is not interested in the result of the suit, the court will not allow him to defend.^e

Who may defend as landlord.

Where a landlord defrayed the costs of defending an ejectment in the name of an illiterate tenant, who gave a *retraxit* of the plea and *cognovit* of the action, the court set aside the *retraxit* and *cognovit*, and permitted the landlord to defend.^f

A third person cannot defend as landlord, where it appears that the tenant in possession, came in as tenant to the lessor of plaintiff, and paid rent to him, under an agreement which has expired.^g If a party should be admitted to defend as landlord, whose title is inconsistent with the possession of the tenant, the lessor of the plaintiff may apply to the court, or to a judge at chambers, and have the rule discharged with costs.^h Where, upon an ejectment against the tenant in possession, who came into possession as tenant of the lessor of the plaintiff, a third person having an adverse title, entered into a consent rule to "defend as landlord, the court discharged the consent rule with costs."ⁱ

*907

The motion to admit the landlord to be defendant, instead of the tenant, ought regularly to be made before judgment is signed against the casual ejector by the opposite party; and if it be delayed until after that time, the court will grant the motion, or not, at their discretion.^j

^a Even before the passing of this act the landlord might have defended along with the tenant; and it is said that he might defend alone, without joining the tenant. Fairclaim d. Fowler v. Shamittle, 3 Burr. 1301.

^b Lovelock d. Norris v. Dancaster, 4 T. R. 122. But not if he be a *cestui que trust*, and out of possession. *Id.*

^c Doe d. Heblethwaite v. Roe, 3 T. R. 783.

^d Doe d. Tilyard v. Cooper, 8 T. R. 645.

^e Doe d. Pearson v. Roe, 6 Bing. 613. (19 Eng. C. L. 178.) 4 M. & P. 437.

^f Doe d. Locke v. Franklin, 7 Taunt. 9. (2 Eng. C. L. 7.) 1 Chit. 390. (18 Eng. C. L. 111.)

^g Doe d. Knight v. Smythe, 4 M. & S. 347.

^h Doe d. Harwood v. Lippencott, Adams, 260.

ⁱ Doe d. Horton v. Rhys, 2 Y. & J. 88.

^j See *ante*, 904.

The appearance should, in all cases, be entered of the term mentioned in the notice (unless it be a country cause.) Where the notice was to appear in Hilary Term, and the tenant entered an appearance in Michaelmas Term, and did nothing farther, and the plaintiff's lessor, finding no appearance of Hilary Term, signed judgment against the casual ejector, the court held the judgment regular, but afterwards set it aside upon payment of costs, to try the merits.^a

When an appearance should be entered.

In all country ejectments, in the King's Bench or Common Pleas, which shall be served before the first day of any Michaelmas or Easter term, the time for the appearance of the tenant in possession, must be within four days after the end of such Michaelmas or Easter term, and not be postponed till the fourth day after the end of Hilary or Trinity terms respectively following.^b But in the Exchequer, where country ejectments are moved for in terms not issuable, the defendant is entitled to four days' time after the next issuable term, to appear.^c

2.—*The consent rule.*] It has been shown that the tenant^d may appear and defend the action alone, or jointly with his landlord; or that, if the tenant refuse, the landlord may appear alone. The appearance in all these cases is effected in the same manner, by application to the court, to be made the defendant instead of the casual ejector, upon entering into the consent rule.⁽¹⁾ The course to be pursued is as follows:—The party applying for leave to defend, must, through his attorney, procure a blank form of a consent rule, and entitle it in the margin with the names of the plaintiff and casual ejector, inserting also therein the premises as described in the declaration. He must then sign his name to this paper, which is called the agreement for the consent rule, and leave the same at one of the judges' chambers when the proceedings are in the King's Bench, or with the prothonotary when in the Common Pleas, together with a plea of not guilty. Common bail is then entered for the tenant, if the proceedings are by bill, or the usual appearance, if by original; and the suit proceeds in his name instead of that of the casual ejector. When the landlord appears either jointly with the tenant, or alone, there must be a motion, with counsel's signature, to admit the landlord, and if the latter appear alone, there must also be an affidavit of the tenant's refusal to appear, annexed to the consent rule.^e

How an appearance is to be made.

*908

^a Adams, 268.

^b Reg. Gen. K. B. E. T. 2 Geo. IV. 4 B. & A. 539. 2 B. & B. 705. 5 Moore, 636.

^c Reg. Gen. (Exch.) H. T. 39 Geo. III. 2 Chitty, 376. 8 Price, 504. 9 Price, 299.

^d If the tenant refuse to appear, the landlord cannot appear in his name, or appoint an attorney to appear for him; an irregular appearance of this sort will be ordered to be withdrawn. Adams, 260.

^e Adams, 265.

(1) (*Jackson v. Scoville*, 5 Wend. 96. *Jackson v. Leek*, 12 Wend. 105.)

Nature of
the con-
sent rule.

The consent rule contains conditions to be observed by the plaintiff as well as by the defendant, and is in substance as follows:—The party appearing undertakes to receive a declaration in ejectment, and plead not guilty. At the trial of the issue to confess lease, entry, ouster, and possession of the premises, in respect of which he defends, and insist upon title only; or if he fails in this respect, so that the plaintiff shall not be able to prosecute his suit, such party shall pay to the plaintiff the costs of the *non pros*, and suffer judgment to be entered against the casual ejector. The claimant undertakes, that if a verdict shall be given for the defendant, or the plaintiff shall not prosecute his suit for any other cause than the non-confession of lease, entry, and ouster, he shall pay costs to the defendant. When the landlord appears alone, the undertaking is, that the plaintiff shall be at liberty to sign judgment immediately against the casual ejector, but that execution shall be stayed until the court shall further order.^a

*909

The consent rule will in all cases prevent a nonsuit for want of proof of lease, entry, and ouster, except in ejectments, to avoid a fine, when there must be an actual entry. Where an ejectment is brought by a joint tenant, a co-parcener, or tenant in common, against his companion, to support which an *actual ouster* is necessary, the plaintiff must apply to the court for leave to enter into a special rule, requiring the defendant to confess lease and entry, but not ouster, unless an actual ouster can be proved; and this rule will be always granted.^b

When the
landlord
defends
alone.

When the landlord is admitted to defend without the tenant, judgment must be signed against the casual ejector, according to the conditions of the consent rule. The reason for this practice is, to enable the claimant to obtain possession of the premises, in case the verdict be in his favor; because, as the landlord is not in possession, no writ of possession could issue upon a judgment against him. Where a landlord defended alone, and died before the trial of the cause, devising his real estate to *B.*, and the lessor was prevented by the statute of limitations from bringing a fresh ejectment, the court gave him leave to sign judgment against the casual ejector in the old suit, and issue execution thereon, unless *B.* consented to appear and defend as landlord.^c

3.—*Consolidation of actions.*] When there are several tenants in possession, who are served with declarations for different premises, the court will not, on the motion of the plaintiff, allow them to be joined in one action, as each defendant must have a remedy for his costs, which he could not have if

^a An attachment will lie against either party for a disobedience of the consent rule, as of any other rule of court, which affords a summary remedy for their costs.

^b *Doe d. Gigner v. Roe*, 3 Taunt. 397. But see *Doe d. Dupleix v. Roe*, 1 Anst. 86, where it is said that the Court of Exchequer will not grant such a rule.

^c *Doe d. Grubb v. Grubb*, 5 B. & C. 457. (11 Eng. C. L. 275.)

they were joined in one declaration, and the plaintiff prevailed only against one of them.* But where several ejectments are brought for the *same premises*, upon the *same demise*, the court, on motion, or a judge at chambers, will order them to be consolidated.^b

*4.—*Plea and issue.*] We have seen that the plea of the general issue, which is *not guilty*, should be left with the consent rule. If it be not, the plaintiff must give a rule to plead, and enter judgment for want of a plea, as in other actions, without special motion in court for the purpose.* In practice there is rarely any other plea; for as the plaintiff must prove a right of possession in himself, whatever operates as a bar to that right, as a fine with a non-claim, the statute of limitations, &c., will entitle the defendant to a verdict under the general issue.^c The courts, will, however, permit the defendant to plead specially, if the circumstances of the case require it. Thus the defendant, with the leave of the court, may plead to its jurisdiction, before a rule *nisi* for judgment against the casual ejector.^d So ancient demesne may be pleaded, with the permission of the court; but application to plead it must be made within the first four days of term, and it must be founded upon an affidavit that the lands are holden of a manor of ancient demesne, and that the claimant has a freehold interest.^e But a plea of release, *puis darrien continuance*, is bad on general demurrer, because the lessor of the plaintiff cannot release.^f

*910
The plea should be left with the consent rule.

When the consent rule has been obtained, the plaintiff is at liberty to make up the issue, which must agree with the declaration in every respect, except in the defendant's name, which is substituted for Richard Roe. If there be a difference between the issue and the declaration, the court will, on motion, set it right.^g But the court refused to set aside the verdict in ejectment, on the ground that there was a variance between the description of the premises in the *nisi prius* record (upon which the plaintiff recovered) and the issue; it not being *stated how the premises were described in the declaration delivered.^h

*911

When the issue is made up, it should be delivered to the Notice of opposite attorney, with notice of trial indorsed, and the cause trial.

^a Smith v. Crabb, 2 Stra. 1149. Run. 187.

^b Id. Roe d. Burlton v. Roe, 7 T. R. 477.

^c Adams, 270.

^d Id. Run. 234.

^e Williams d. Johnson v. Keen, 1 Bl. 197.

^f Denn d. Root v. Fenn, 8 T. R. 474. Doe d. Rust v. Roe, 2 Burr. 1046. And see Doe d. Morton v. Roe, 10 East, 523.

^g Doe d. Byne v. Brewer, 4 M. & S. 300. This rule of H. T. 4 Will. IV, requiring pleading subsequent to the declaration to be delivered between the parties, does not apply to actions of ejectment, which are left to the old practice. Doe d. Williams v. Williams, 4 Nev. & M. 259. 2 Adol. & Ellis, 381. (29 Eng. C. L. 192.)

^h Bass v. Bradford, 2 Lord Raym. 1411.

ⁱ Doe d. Cotterill v. Wylde, 2 B. & A. 472.

is carried to trial as in other actions. In ejectment under 11 Geo. IV, & 1 Will. IV, c. 70, s. 36, if the defendant appears, it is no ground for setting aside a verdict for the plaintiff, that the defendant has not received six days' notice of trial, as required by that statute; though if proper notice were not given, and the plaintiff proceeded; the defendant not appearing, it would be a good ground for moving to set aside the verdict.*

SECTION XII.

WHEN THE COURT WILL STAY THE PROCEEDINGS.

	PAGE		PAGE
1. Security for costs.		4. Payment of mortgage money under 7 G. II, c. 20.	915
2. Payment of costs in case of a second ejectment.	912	5. Delivery of particulars, of breaches.	917
3. Payment of rent and costs under 4. G. II, c. 28.	914		

HAVING considered the proceedings in ejectment up to the period of going to trial, it may be convenient to notice in this place the cases in which the courts, in the exercise of their discretionary power, will, upon application, stay the proceedings in the action.

When the lessor of the plaintiff is an infant or abroad, he must give security for the costs. *912

1.—*Security for costs.*] Whenever an infant is lessor of the plaintiff, the court will stay the proceedings until security be given for the costs, unless a responsible person has been made plaintiff, or the *prochein ami*, or guardian, undertakes to pay them.^b So if the lessor resides abroad.^c But the court will not stay the proceedings where one only of two lessors of the plaintiff resides abroad, for the defendant has the party, who is not abroad, as a security.^d So if the lessor of the plaintiff *dies during the action the court will stay the proceedings until security be given for the costs.^e

And when the lessor is unknown to the defendant, the latter may demand an account of his residence, or place of abode, from the lessor's attorney, and if he refuse to give it, or give a fictitious account of a person who cannot be found, proceedings will be stayed until security for the costs be given.^f

* Doe d. Antrobus v. Jepson, 3 B. & A. 403.

^b Anon. 1 Wils. 130. 1 Cowp. 128. Noke v. Windham, Stra. 694, 922.

^c B. N. P. 111. Adams, 354.

^d Doe d. Bawden v. Roe, 1 Hodges, 315.

^e Trustout d. Turner v. Grey, 2 Stra. 1056.

^f Adams, 354. Tidd's Prac. 476.

2.—*Payment of costs in case of a second ejectment.*] Also The court will stay the proceedings in a second ejectment until the costs are paid of a prior one, even though it be brought by a third person, or for different premises, if the title be the same.^a Thus, proceedings have been stayed where one of the lessors of the plaintiff in the first action died before the commencement of the second; where in the second ejectment two trustees were added to the lessors; where part of the lands were occupied by new tenants; where the second action was between the heir of the plaintiff's lessor, and the heir of the defendant in the first action.^b

And the rule applies as well to a case where the second ejectment is brought by the assignee of an insolvent debtor, the first having been brought by an insolvent as to a case where the second has been brought by the same party as the first. Therefore where *A.* having brought ejectment, and had judgment of nonsuit against him, after which he took the benefit of the insolvent debtors' act, having inserted the costs in his schedule, and his assignee brought a second ejectment; it was held, that the proceedings should be stayed until the costs of the first were paid.^c And it is immaterial that the second ejectment is brought in a different court from the first.^d

*But the courts will not stay the proceedings in the second action, where the party against whom the application is made, is already in custody under an attachment for non-payment of the costs of the first.^e

*913

Though the court may stay proceedings in a new ejectment until the costs of a former ejectment, between the same parties, and also the costs of an action for *mesne* profits dependent thereon, are paid;^f yet they will not extend the rule to include the damages in the action for the *mesne* profits, however vexatious the proceedings of the present lessors of the plaintiff may have been.^g Nor will they stay the proceedings if it clearly appear that the verdict in the first action was obtained by fraud or perjury;^h nor will they in any case in which they stay proceedings, further interfere so as to compel the claimant to pay the costs by a particular day, or be *nonprossed*.ⁱ Where an heir at law brought ejectment for part of the

When the court will not stay proceedings in a second ejectment.

^a *Doe v. Law, and Fairclaim v. Thrustout*, 1 Tidd's Prac. 583. *Keene d. Angel v. Angel*, 6 T. R. 740. And see *Doe d. Rees v. Thomas*, 4 D. & R. 145.

^b *Doe d. Hamilton v. Hatherly, Stran.* 1152. *Thrustout d. Williams v. Holdfast*, 6 T. R. 293. *Keene d. Angel v. Angel*, 6 T. R. 740. *Doe d. Feldon v. Roe*, 8 T. R. 645. *Doe d. Cotterill v. Roe*, 1 Chitty, 195. (18 Eng. C. L. 64.)

^c *Doe d. Standish v. Roe*, 5 B. & Ad. 878. (37 Eng. C. L. 225.) 9 N. & M. 468. See *Doe d. Chadwick v. Law*, 2 Bl. 1180.

^d *Doe d. Walker v. Stephenson*, 3 B. & P. 29. *Doe d. Chadwick v. Law*, 2 Bl. 1158. See *Doe d. Carthew v. Brenton*, 6 Bing. 469. (19 Eng. C. L. 186.)

^e 2 Sell. Prac. 232. *Adams*, 359. ^f *Doe d. Pinckard v. Roe*, 4 East, 585.

^g *Doe d. Church v. Barclay*, 15 East, 232.

^h *Doe d. Rees v. Thomas*, 2 B. & C. 622. (9 Eng. C. L. 203.)

ⁱ *Doe d. Sutton v. Ridgway*, 5 B. & A. 523. (7 Eng. C. L. 179.)

demised premises, and failed, and then brought a second ejectment against other parties for other parts; the court refused to stay proceedings until the costs of the first were paid.^a A party cannot move to stay the proceedings in a second ejectment, until the costs in the first be paid, before he has entered into the consent rule, for he has no interest, and cannot complain of being harassed.^b But where the former action was discontinued, before the consent rule was entered into, the court stayed the proceedings in the second until the costs of the former were paid.^c There is no particular stage of the proceedings in which it is necessary to move the court for this rule, except that, as we have shown, the rule will not be granted before the defendant has appeared.

- *914 *Where, in a country cause, a declaration in ejectment was delivered on the 30th of September, and, on the fifth day of the ensuing Hilary term, a motion was made to stay proceedings in that ejectment until the costs of a former ejectment were paid; held, that the motion was not too late, although a term had elapsed since the commencement of the action, and notice of trial had been given.^d

When proceedings will be stayed on payment of rent and costs.

3.—*Payment of rent and costs under 4 Geo. II, c. 28.*] In ejectment for non-payment of rent, under 4 Geo. II, c. 28, it is provided by section 4 of that statute, that if the tenant shall at any time before the trial pay or tender to the landlord, his executor or attorney in the cause, or pay into court all the rent and arrears, together with costs, all further proceedings in the ejectment shall cease and be discontinued.^e

By the terms of this enactment, the application on behalf of the tenant to stay proceedings, on payment of the rent and costs must be made *before the trial*, the court therefore will not grant such an application *after the trial*,^f even though the case may not be strictly within the statute; as where the proviso in the lease was, that if the rent was in arrear for twenty one days, the lessor might re-enter, the court refused such an application made after the trial.^g Nor will they grant it, except by consent, where a writ of possession is executed.^h

^a Doe d. Thomas v. Harris, 4 M. & R. 569.

^b Doe d. Crockett v. Roe, 1 H. & W. 351.

^c Doe d. Langdon v. Langdon, 5 B. & Ad. 864. (37 Eng. C. L. 219.) 2 N. & M. 840. Smith d. Ginger v. Barnardiston, 2 Bl. 904.

^d Doe d. Martin v. Packer, 2 C. & M. 457.

^e Before this statute, courts of law and equity exercised a discretionary power of staying the lessor from proceeding at law in cases of forfeiture for non-payment of rent, by compelling him to take the money due to him. See the opinion of Lee, C. J., in Archer v. Snapp, Andr. 341. 2 Salk. 597. 10 Mod. 383. 1 Wils. 75. 2 Str. 900. S. N. P. 717. Upon a motion to set aside an ejectment and restore the possession upon payment of the rent due and costs, the rent must be calculated only to the last rent day, not to the day of computing. Doe d. Harcourt v. Roe, 4 Taunt. 883.

^f Roe d. West v. Davies, 7 East, 363. Doe d. Lambert v. Roe, 3 Dowl. 557.

^g Doe d. Harris v. Masters, 2 B. & C. 490. (9 Eng. C. L. 158.) 4 D. & R. 45.

^h Anon. Woodf. 813.

Where the rent was tendered after the landlord had given instructions to his attorney to commence an action, and before the declaration had been delivered, the court set aside the subsequent proceedings with costs.^a

*Where the lessors of the plaintiff were both devisees and executors, and in each capacity rent was due to them, the defendant moved to stay proceedings on payment of the rent due to the lessors of the plaintiff as devisees, they not being entitled to bring ejectment as executors: there appeared to be a mutual debt to the defendant by simple contract, and the defendant offered to go into the whole account, taking in both demands, as devisees and executors, having just allowances, which the lessors of the plaintiff refused, the rule was made absolute to stay proceedings on payment of the rent due to the lessors as devisees, and costs.^b *915

Where ejectment was brought on a clause of re-entry in a lease for not repairing, as well as for rent in arrear; on a rule to show cause why the proceedings should not be stayed on payment of the rent and costs, it was insisted on the part of the plaintiff that it was not within the statute, because it was not founded singly on the non-payment of rent; the court, however, made the rule absolute, with liberty for the plaintiff to proceed upon any other title.^c

The application to stay proceedings may be made in term time in court, or in vacation before a judge at chambers.^d

4.—*Payment of mortgage-money, under 7 Geo. II. c. 20.* [Proceedings will be stayed in judgment by a mortgagee on payment of the money due on the mortgage and costs.] By the 7 Geo. II, c. 20, s. 1, it is enacted "that when an ejectment is brought by a mortgagee for the recovery of the possession of the mortgaged premises, and no suit is depending in any court of equity, for the foreclosing or redeeming of such mortgaged premises, if the person having a right to redeem, having been made the defendant in the action, shall at any time, pending the suit, pay to the mortgagee, or into court, all the principal moneys and interest due on the mortgage, and the costs to be computed by the court or proper officer appointed for that purpose; the same shall be deemed and taken to be a full satisfaction and discharge of the mortgage, and the court shall discharge the mortgagor from the same accordingly." By the third section, "the act is not to extend to any case where the person against whom the redemption is prayed, shall insist, either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other sums than what appear on the face of the mortgage, nor to any case where the right of redemption shall be controverted by different defendants in the same cause."^e *916

^a Goodright d. Stephenson v. Noright, 2 Bl. 746.

^b 2 Sell. Prac. 211. Barn. 184. Adams, 171.

^c Pure d. Withers v. Sturdy, B. N. P. 97.

^d 2 Sell. Prac. 127.

^e It is provided by the 4. G II, c. 28, s. 2, *ante*, 914, that nothing therein contained

The application to stay proceedings under this statute should be made after appearance and before execution executed. But where the recovery was against the tenant of the mortgagor under a judgment by default, the court said that they would set aside the judgment and let in the mortgagor to defend as landlord, that he might be in a condition to apply to the court to stay the proceedings on the terms of the statute; but the mortgagee consented to take what was due, and restore the possession.^a

The court stayed the proceedings under this statute after an agreement, on the part of the mortgagor, to convey the equity of redemption to the mortgagee, where no tender of a deed of conveyance for execution had been made to the defendant, or bill in equity filed,^b but where it appeared that, subsequently to the defendant's agreement, several applications had been made to him, but without effect, to complete the purchase, the court refused to stay the proceedings.^c Nor will they stay the proceedings on payment of the arrears, of *interest* and *costs*, where, by the terms of the mortgage deed, the principal is due on default made in the payment of interest.^d

*917 Where the mortgagor had taken up money from the mortgagee on his bond, the court stayed the proceedings on payment of the mortgage and interest only; the bond debt not being a lien upon the lands.^e Where, however, the bond was *a lien on the estate*, and the mortgagee had given notice to the mortgagor, that he should insist upon payment of the money due upon it, the court refused to stay the proceedings upon payment of the mortgage money only.^f So, where there were two mortgages, although upon different premises, the court refused to stay proceedings as to one mortgage, upon the payment of the sum due upon that mortgage only.^g

But the defendant is entitled to have the proceedings stayed on payment of the principal and interest due on the mortgage deed, without paying any by-gone interest, or the expense of preparing the mortgage deed or any assignment of it.^h

Where, on a motion of this kind any doubt exists as to the amount of what is due between the parties, the courts, pursuant to the terms of the statute, will refer the case to their respective officers, who will make just allowances and deduc-

shall extend to bar the right of any mortgagee of such lease, who shall not be in possession, so as such mortgagee shall, within six calendar months after such judgment obtained, and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor, or persons entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements, which on the part and behalf of the first lessee or lessees ought to be performed.

^a Doe d. Tubb v. Roe, 4 Taunt. 887.

^b Skinner v. Stacey, 1 Wils. 80.

^c Goodtitle d. Tysum v. Pope, 7 T. R. 185.

^d Goodtitle d. Green v. Notidle, 11 Moore, 491. (33 Eng. C. L. 490.)

^e Bingham d. Lane v. Gregg, Barn. 182. Adams, 364.

^f Felton v. Ash, Barn. 177.

^g Roe d. Kaye v. Soley, 2 Bl. 726.

^h Doe d. Blagg v. Steel, 1 Dowl. 359.

tions.^a If after taxation the debts and costs are not paid, the lessor may proceed with the suit; he cannot have an attachment.^b The application under this statute may be made in term in court, or in vacation before a judge at chambers.^c

5.—*Delivery of Particulars.*] When the ejectment is brought on the forfeiture of a lease, the proceedings will be stayed, upon the application of the tenant, until the plaintiff delivers a particular of the breaches of covenant on which he intends to rely.^d So, where the plaintiff declared generally for more messuages than the defendant claimed, and the defence was general; the judge at chambers, upon application of the defendant, made an order that the plaintiff should specify the particulars for which his declaration was served, and that the defendant should specify the particulars for which he defended within four days.^e So, if the plaintiff be not known to the defendant, the latter may call upon the attorney of the former for a particular of his residence, and if the attorney does not give a satisfactory account in that respect, the court will stay proceedings until security be given for the costs.^f

*918

SECTION XIII.

OF PROCEEDINGS UNDER 1 G. IV., 87, WHERE THE TENANT HOLDS OVER.

By 1 Geo. IV, c. 87, s. 1, "where the term or interest of any tenant, holding under a lease or agreement in writing, any lands, tenements, or hereditaments for any term or number of years certain, or from year to year, shall have expired, or been determined either by the landlord or tenant by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon, or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, he may at the foot of the declaration, address a notice to such tenant or person, requiring him to appear on the first day of the term next following, to be made defendant, and to find bail if ordered by the court; and upon

^a 2 Sell. Prac. 220. Barn. 176.

^b Hand v. Dinely, 3 Stra. 1220.

^c Woodf. 815.

^d Doe d. Birch v. Phillips, 6 T. R. 597.

^e Doe d. Saunders v. The Duke of Newcastle, 7 T. R. 332, n.

^f 1 Tidd's Prac. 476.

verdict
should
pass
against
him.

*919

appearance, or in case of non-appearance, or making the usual affidavit of service, the landlord producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, may move the court for a rule for such tenant or person to show cause, within a time to be fixed by the court, on a consideration of the situation of the premises, why such tenant or person, upon being admitted defendant, besides entering into the common consent-rule, should not undertake, in case a verdict "should pass for the plaintiff, to give him a judgment, to be entered up against the real defendant of the term next preceding the trial; and also why he should not enter into a recognizance by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages recovered by the plaintiff in the action; and the court, on cause shown, or affidavit of service, may make the rule absolute in the whole or in part, and order such tenant or person, within a time fixed, to give such undertakings, and find such bail, with such conditions, and in such manner as shall be specified in the rule or such part of the same so made absolute; and if the party shall neglect or refuse so to do, and shall lay no ground to induce the court to enlarge the time for obeying the same, then upon affidavit of service of the order, the rule may be made absolute to enter judgment for the plaintiff."

One of the main objects of this statute was to save the landlord the necessity of going to trial where the tenant holds over vexatiously, and where the trouble and expense of an ejectment may be very disproportionate to the value of the premises.^a A tenancy by virtue of an agreement in writing *for three months certain*, is a tenancy for a term within the meaning of this statute.^b But a tenant from year to year *without a lease or agreement in writing* is not within it,^c nor is a tenancy for years *determinable on lives*, for it is not a holding for a number of years certain.^d

To what
cases the
statute ap-
plies.

The statute applies only to cases where the lease or term has expired by efflux of time, and, therefore, it does not extend to a tenancy determined by a notice to quit, either from the landlord to the tenant, or to the landlord by the tenant, where there is a subsisting lease determinable at the end of a certain number of years;^e nor to a case where the tenant has surrendered

^a Per Abbott, C. J., in *Doe d. Phillips v. Roe*, 5 B. & A. 768. (7 Eng. C. L. 253.)
^b *Id.*

^c *Doe d. Bradford (Earl of) v. Roe*, 5 B. & A. 770. (7 Eng. C. L. 254.)

^d *Doe d. Pemberton v. Roe*, 7 B. & C. 2. (14 Eng. C. L. 3.)

^e *Doe d. Cardigan v. Roe*, 1 D. & R. 540. (16 Eng. C. L. 55.) But it applies to the case of a yearly tenancy under a written agreement.

his term but refuses to quit;^a nor to a case where the title to the premises is disputed between the parties.^b Where a landlord, who was tenant in common, brought ejectment for his undivided part, it was held to be within the statute, and that the tenant should enter into a recognisance.^c But if a landlord allow his tenant to hold over above a year, without taking any step to recover the premises, he is not entitled to the benefit of the statute.^d *920

The time within which the undertaking and security required by the statute shall be given, will be fixed by the court when the rule is granted.^e It *may* be made part of the rule that the landlord be at liberty to sign judgment against the casual ejector, if the tenant fails to give the required security.^f If the tenant does not appear to give the undertaking, or enter into a recognisance at the period required by the rule, the court will permit the plaintiff to enter up judgment.^g On the appearance of the defendant, the court will direct recognisance to be entered into for the costs of the action only, to be ascertained by their officer, and not for the mesne profits.^h The recognisance should be entitled in the name of the tenant in place of the original nominal defendant.ⁱ Giving security.

The notice at the foot of the declaration required by the statute must be signed by the landlord or his agent, and should be in addition to, and not form part of the ordinary notice signed by the casual ejector.^j It is sufficient if such notice requires the defendant "to appear and be made defendant, and find such bail, &c., and for such purposes as are specified in the act of parliament," without stating those purposes in detail.^k Notice.

^a Doe d. Tindall v. Roe, 2 B. & Ad. 923. (22 Eng. C. L. 211.)

^b Doe d. Sanders v. Roe, 1 Dowl. 4.

^c Doe d. Mayor v. Rotherham, 1 Gale, 157. It was held also in this case that the affidavit of the execution of the writing by which the tenant held need not be proved by the attesting witness.

^d Doe d. Thomas v. Field, 2 Dowl. 542. See Roe d. Durant v. Doe, 6 Bing. 574. (19 Eng. C. L. 169.)

^e Doe d. Anglesey (Marquis of) v. Brown, 3 D. & R. 688. (16 Eng. C. L. 115.)

^f Doe v. Roe, 2 Dowl. 180.

^g Doe d. Sampson v. Rice, 6 Moore, 54. (17 Eng. C. L. 15.)

^h *Id.*

ⁱ Roe d. Durant v. Moore, 6 Bing. 656. (19 Eng. C. L. 194.)

^j *Anon.* 1 D. & R. 435. *n.* Beard v. Roe, 1 Mees. & W. 360. 2 Gale, 48.

^k *Id.*

•SECTION XIV.

OF THE EVIDENCE.

	PAGE		PAGE
1. Evidence of the plaintiff's title in general.		8. By an execution creditor.	937
2. In ejectment by a landlord against his tenant.	929	9. By a mortgagee.	938
3. Disputing landlord's title.	925	10. By an executor or administrator.	939
4. Waiver of forfeiture.	929	11. By assignees.	939
5. In ejectment by the heir.	931	12. By a parson.	940
6. Illegitimacy.	934	13. In ejectment for copyhold lands.	940
7. In ejectment by devisee.	936	14. Who may be witnesses.	941

The plaintiff must show a legal and possessory title.

1.—*Evidence of the plaintiff's title in general.*] THE evidence required to support the plaintiff's case in ejectment, will vary according to the nature of his title to the premises. We have seen* that the plaintiff must recover on the strength of his own title, and that he can derive no support from the weakness of that of his adversary.⁽¹⁾ Therefore the plaintiff must in all cases prove a *legal* and *possessory* title in himself, unless when he claims as landlord, or where there exists a privity of estate between him and the defendant; in which case, as we shall show hereafter, the plaintiff need not prove his title, for the defendant will not be permitted to dispute it. As the tenant in possession cannot be allowed to defend, unless he has entered into the consent rule, which confesses lease, entry, ouster, and possession of the premises,^b by his appearance at the trial, he admits every thing that is required by that rule. The plaintiff, therefore, is not required to give evidence of any of those facts, or even to produce the consent rule; unless there be a doubt as to the identity of the premises. As where the plaintiff directs his case to certain premises, and the other party contends that he does not defend for those; in which case it may be necessary to produce the rule to show for what he does defend.^c The locality of the premises, as described in the declaration, must be proved.^d The court will, however, in *922 *general, permit the plaintiff to amend, where there is a variance in this respect.^e The title proved must be consistent with

* *Ante*, 828.

^b See *ante*, 908.

^c Per Lord Tenterden, C. J., in *Doe d. Greaves v. Raby*, 2 B. & Ad. 949, (22 Eng. C. L. 219,) overruling *Doe d. Lamb v. Lamb*, M. & M. 237. (22 Eng. C. L. 301.)

^d See *ante*, 884.

^e See "Amendment," in the Index, and *Doe d. Marriott v. Edwards*, 6 C. & P. 208, (25 Eng. C. L. 359.) *Doe d. Marsack v. Read*, 12 East, 57.

(1) (The defendant may meet a prima facie good title in the lessor of the plaintiff, by showing an outstanding legal title in a third person a stranger to the action. *Kennedy v. Spece*, 3 Watts 97. *Anon.* 1 Rawle, 447. *Seckle v. Engle*, 2 Rawle 68. *Cox v. Blanden*, 1 Watts 533. *Schauber v. Jackson*, 2 Wend. 14. *Greenleaf's Lessee v. Birth*, 6 Peters, 302. *Tucker's Ex. v. Keeler*, 4 Verm. 161.)

the demise in the declaration; therefore, if there be a joint demise by several persons, there must be evidence of a joint interest in the whole premises.^a If there be a joint demise, and a joint title be not proved, the plaintiff must be nonsuited; for the court will not allow an amendment.^b The payment of an entire rent to the common agent of the lessors of the plaintiff is *prima facie* evidence of their joint title.^c Proof of an actual entry on the premises is in no case necessary, except when the plaintiff's title would be otherwise barred by the statute of limitations;^d or to avoid a fine levied with proclamations.^e But as by 3 & 4 W. IV, c. 74, s. 2, no fine or recovery shall be levied or suffered after the 31st of October, 1834, few instances only can occur of the necessity of proving an entry to avoid such fine.

2.—*Evidence in ejectment by a landlord against his tenant.*] When the ejectment is by the landlord, or a party between whom and the defendant a privity of estate exists, the plaintiff, as we have shown, is not required to prove his title, but he must prove the existence and termination of the privity. As if the defendant be put into possession upon an agreement for the purchase, or for a lease of the premises, evidence must be given to show that the negotiation was broken off, and that a demand of the possession was made of him previous to the day of the demise in the declaration.^f So where the defendant is tenant at will, it must be shown how he became tenant, and that the tenancy was determined by a demand of possession, or otherwise, as the case may be;^g for the common consent rule is not evidence of such determination.

When the relation of landlord and tenant regularly subsists between the parties, or those under whom they claim, there are three ways whereby the tenancy may be determined; 1st, by efflux of time; 2dly, by notice to quit; 3dly, by forfeiture. *923

The expiration of a tenancy by efflux of time, is proved by evidence of the contract under which the defendant is in possession. If the demise be by deed, or in writing, it must be proved by the production of the original, or of a counterpart.^h If there be no counterpart, and the original be in the possession of the defendant, notice to produce it must be given, and if not produced, the plaintiff may give secondary evidence of its contents; but he cannot give such evidence, without having given notice to produce the original. If the demise be by parol, it may be proved by a person who was present at the making of

The landlord must give evidence of the commencement and determination of the tenancy.

Expiration of tenancy by efflux of time to be proved by the production of the deed or other writing.

^a See *ante*, 880.

^b Doe d. Poole v. Errington, 1 Add. & Ell. 750. (28 Eng. C. L. 197.)

^c Doe d. Clarke v. Grant, 12 East, 221.

^d See *ante*, 830.

^e *Ante*, 853.

^f Right d. Lewis v. Beard, 13 East, 210. Doe d. Newby v. Jackson, 1 B. & C. 448, (8 Eng. C. L. 126,) *ante*, 863.

^g See *ante*, 863. 2 Stark. Ev. 303. Adams, 210.

^h Roe d. West v. Davis, 7 East, 363.

it, or by the admissions of the defendant. But if it should appear by the witnesses on the part of the plaintiff that a contract in writing had been entered into between the parties, it must be produced by the plaintiff. As where the plaintiff's witness proved an acknowledgment by the defendant that he held under T., and stated that he (the witness) had drawn an agreement touching the premises between the plaintiff and T., it was held, that the plaintiff was bound to produce the writing.^a But if it appears that the instrument is not *per se* binding on the parties, as if it be a memorandum of an agreement not signed by the parties, the demise may be proved by parol evidence.^b Where the tenancy is determined by the happening of any particular event, the lessor must show that such event has happened.^c

Proof of
the service
of notice
to quit.

*924

Where the tenancy is determined by reason of notice to quit, the plaintiff must prove the tenancy of the defendant and service of the notice. Service of the notice may be proved by the person who served it, but if there be a subscribing witness to the note, he must be called.^d The contents of the notice may be proved by a duplicate original, or by parol evidence of its contents. It is not necessary to give the defendant notice to produce the original.^e Where it was the practice in an attorney's office for the clerks to serve notice and to indorse the fact of service on duplicates, and on one occasion the attorney himself prepared a notice to quit to serve on a tenant, and took it out with him; and on his return to the office in the evening he indorsed on the duplicate a memorandum of having served the tenant; held, on the trial after the attorney's death, that such indorsement was admissible, as evidence to show the service on the tenant.^f What tenancy is determinable by a notice to quit, and what constitutes a sufficient notice, have been already considered.^g

Non-pay-
ment of
rent.

Where the tenancy is determined by forfeiture, the plaintiff must prove the demise, and the circumstances which operate as a forfeiture. If the ejectment is brought at common law for non-payment of rent, there must be proof of a demand of the *precise sum* due, at a convenient time before sunset *on the day* when the rent is due upon the land in the most notorious place of it, even though there be no person on the land to pay it.^h

If the proceedings be under 4 Geo. II, c. 28, it is not neces-

^a Fenn d. Thomas v. Griffith, 6 Bing. 533. (19 Eng. C. L. 159.)

^b R. v. St. Martin, Leicester, 4 N. & M. 202. 2 Add. & Ell. 210. (29 Eng. C. L. 78.)

^c Adams, 312. ^d Doe d. Sykes v. Durnford, 2 M. & S. 62. *ante*, 863.

^e Jory v. Orchard, 2 B. & P. 41. Kine v. Beaumont, 3 B. & B. 268. (7 Eng. C. L. 440.) Swain v. Lewis, 1 Gale, 182. 2 C. M. & R. 261.

^f Doe d. Patteshall v. Turford, 3 B. & Ad. 890. (23 Eng. C. L. 212.)

^g *Ante*, 853, *et seq.*

^h 1 Saund. 287. n. 16. Doe d. Wheeldon v. Paul, 3 C & P. 613. (14 Eng. C. L. 483.) Roe d. West v. Davies, 7 East, 363.

ⁱ *Ante*, 914.

sary for the plaintiff to prove an actual demand of the rent; but he must show that six months' rent was in arrear, and that there was not sufficient distress on the premises on *some day* from the time that the rent became due, until the day of the demise in the declaration; it is not necessary, however, for him to prove that there was not sufficient distress during the *whole of that time*, evidence of that fact even for *one day* is sufficient.^a But evidence must be given that every part of the premises had been searched. Where the party omitted to enter a cottage, it was held to be an insufficient search.^b But it will be sufficient if he shows that he was prevented by the tenant from entering on the premises to distrain, by his locking up the doors.^c A variance between the amount of rent proved to be due and the amount stated in the particulars of the breaches delivered by the plaintiff, is immaterial.^d

Must show six months' rent in arrear, and not sufficient distress.

*925

If the action be brought on a forfeiture by reason of a breach of covenant, the plaintiff must prove the breach in the same manner as in an action of covenant;^e and if he has given the tenant a particular of the breaches pursuant to an order of the court, he will be precluded from giving evidence of any other breach than those contained in the particular.^f In ejectment for a forfeiture incurred by underletting, it was ruled by Lord Alvanley, that if a person was found in possession acting and appearing as tenant, it was sufficient *prima facie* evidence of an underletting, to call upon the defendant to show in what character such person was upon the premises.^g But in a subsequent case, Lord Ellenborough held, that evidence that a stranger was in possession of the premises, and that he said he had taken the premises from another stranger, was not sufficient; for *non constat* that the party in possession was not a tortious intruder; it was incumbent on the plaintiff to prove that the lessee had either *assigned* or *let*.^h Where a rent charge is granted with power to the grantee, in case the rent shall be in arrear for a certain space of time, to enter and enjoy the lands charged, and to receive, &c., the rents for his own use until satisfaction of the arrears, the grantee may, upon the rent becoming in arrear, maintain ejectment against the tenant without proof of a previous demand of the rent.ⁱ

Evidence in case of forfeiture.

3.—*Disputing landlord's title.*] It is a general rule that a tenant will not be permitted to impeach the title of his landlord,

A tenant must not

^a Doe d. Smelt v. Fuchau, 15 East, 286.

^b Rees v. King, cited 2 B. & B. 514. (6 Eng. C. L. 223.)

^c Doe d. Chippendale v. Dyson, M. & M. 77. (22 Eng. C. L. 256.)

^d Tenny d. Gibbs v. Moody, 3 Bing. 3. (11 Eng. C. L. 4.)

^e See *ante*, 704.

^f Doe d. Birch v. Phillips, 6 T. R. 597.

^g Doe d. Hindley v. Rickarby, 5 Esp. 4.

^h Doe v. Payne, 1 Stark. 86. (2 Eng. C. L. 307.)

ⁱ Doe d. Biass v. Horsley, 3 Nev. & M. 567. 1 Ad. & Ell. 766. (28 Eng. C. L. 201.)

dispute
his land-
lord's title

*926

by showing that it was originally defective.⁽¹⁾ If one party takes an interest in land under another, although that interest be wrongfully acquired, he cannot afterwards dispute the title of the person under whom he took that interest. Therefore where ^aa party under a fraudulent pretence borrowed the keys of a house from another, and then retained possession; it was held, that he could not dispute the title of the lender in an ejectment, so as to maintain his own possession.^b So where *P. N.* and the plaintiff occupied successively premises, under a lease that had been granted in 1809, by parties having no right to make a lease. The defendant in 1827 became possessed of the fee. In the years 1829 and 1831 respectively, the defendant distrained on *P.* and on *N.* for arrears of rent, which they paid; held, that these payments amounted to such an acquiescence by *P.* and *N.* in the title of the defendant, that they, and those deriving possession from or under them, were estopped from disputing it; and this although the defendant himself produced in evidence the lease of 1809, and failed to show that it had been assigned to him.^c So where previous to 1812, a person built a house on a piece of waste ground, and before he acquired a title to it, gave up possession to the tenant of the adjoining land, who held it under a lease granted in 1812. The latter let the premises to the defendant; held, in ejectment by the landlord of the adjoining land against the defendant, that the latter was estopped from denying the title of the tenant and the tenant from disputing that of the landlord.^d So where *A.* having, without title, entered upon land, and built a cottage, afterwards accepted a lease (by indenture) from *B.*; *C.* claiming the land as his own, paid to *A.* 20*l.* to give up the possession to him; held (in ejectment on the demise of *B.* against *C.*) that *A.* had estopped himself from controverting the title of *B.*, and that *C.* was bound by the estoppel, as having come in under, and received the possession from *B.*^e So where a

^a *Wood v. Day*, 7 Taunt. 646. (2 Eng. C. L. 245.) *Parker v. Manning*, 7 T. R. 537. *Sullivan v. Stradling*, 2 Wils. 208. *Cooke v. Loxley*, 5 T. R. 4. *Doe d. Pritchitt v. Mitchell*, 1 B. & B. 11. (5 Eng. C. L. 4.) *Hodson v. Sharp*, 10 East. 355.

^b *Doe d. Johnson v. Baytup*, 1 Harr. & Woll. 270. 3 Add. & Ell. 188. (30 Eng. C. L. 67.) 4 N. & M. 837.

^c *Cooper v. Blandy*, 1 Bing. N. C. 45. (27 Eng. C. L. 304.) 4 M. & Scott, 562.

^d *Doe d. Wheble v. Fuller*, 1 Tyr. & G. 17.

^e *Doe d. Bullen v. Mills*, 1 Nev. & M. 25. 2 Adol. & Ellis, 17. (29 Eng. C. L. 16.) 1 M. & Rob. 395.

(1) (The tenant cannot dispute his landlord's title; and this principle extends also to the case of one who takes possession under a contract of purchase; he cannot controvert the title of the person who let him into possession. The American cases on this head are numerous. See *Boyer v. Watts*, 3 Watts, 449. *Brown v. Dysinger*, 1 Rawle, 408. *Feather v. Strohecker*, 3 Penn. R. 505. *Jackson v. Harper*, 5 Wend. 246. *Jackson v. Spear*, 7 Wend. 401. *Jackson v. Stansbury*, 9 Wend. 201. *Peyton v. Stith*, 5 Peters, 485. *Hughes v. The Trustees of Clarksville*, 6 Peters, 369. *Tuttle v. Reynolds*, 1 Verm. 80. *Reed v. Shepley*, 6 Verm. 202. *Tyler v. Hammond*, 11 Pick. 193. *Den v. Gustin*, 7 Halst. 42. *Bowber v. Walker*, 1 Verm. 18. *Boyer v. Smith*, 5 Watts, 55.)

defendant, in an action for use and occupation, had occupied apartments in a house belonging to a wife, and had paid rent to the husband, who subsequently granted a lease of the whole house to the plaintiff; held, that having occupied with notice of the lease, he could not impeach its validity, nor controvert "the plaintiff's title." Where the defendant, in March 1832, took certain premises from *F. and B.*, "agents for the trustees of the joint estate of *T. and S. B.*" Upon the trial of an action for use and occupation brought by the plaintiffs, "as trustees of the joint estate of *T. and S. B.*," against the defendant, it appeared by the plaintiff's own evidence, that in 1831 they were trustees for the estate of *S. B.* only; held, that the defendant was estopped from taking advantage of this discrepancy, having in 1832 taken the premises of plaintiffs as trustees of the joint estate.^b *927

The interest of a tenant for life and a reversioner are the same; and therefore a lessee who has paid rent to the first cannot set up title in another person as an answer to an action by the latter after the death of the former.^c Upon an information to set aside a lease of charity lands, it was held in chancery, that the lessees could not dispute by setting up an adverse title whilst they retain the possession.^d An assignee of a void lease by a tenant for life, is estopped from disputing the title of the remainder-man, though his assignment was after the death of the tenant for life, and payment to and acceptance of rent by the remainder-man, and with notice of that fact.^e The assignee of a lease is estopped by the deed which estops his assignor.^f Tenant for life must not dispute the title of the reversioner.

But though a party cannot dispute the title of his landlord, or the person under whom he has entered, or whose title he has recognised, he will be permitted to show the nature of such title, and that though originally a valid one it has expired.^g The tenant may show that the title has expired.

Where a tenant for life demised for twenty-one years, by indenture, and the lessee covenanted to deliver up the premises at the end of the term to the lessor, his heirs and assigns; the lessor died, and in ejectment brought by his devisee: held, that an interest passed by the indenture of demise, and that "therefore the defendant was not estopped from showing what his lessee's title originally was and that it was determined since the demise." Defendant, after being let into possession of certain premises by *P.*, and paying rent to him paid one quar- *928

^a *Rennie v. Robinson*, 1 Bing. 147. (8 Eng. C. L. 275.)

^b *Fleming v. Gooding*, 10 Bing. 549. (25 Eng. C. L. 239.) 4 M. & Scott, 455.

^c *Doe v. Whitroe*, 1 D. & R. N. P. C. 1. (16 Eng. C. L. 409.)

^d *Att. Gen. v. Lord Hotham*, 3 Russ. 415.

^e *Johnson v. Mason*, 1 Esp. 89.

^f *Taylor v. Needham*, 2 Taunt. 278.

^g *Neave v. Moss*, 1 Bing. 360. (8 Eng. C. L. 348.) *England d. Syburn v. Slade*, 4 T. R. 682. *Doe d. Jackson v. Ramsbottom*, 3 M. & S. 516. *Phillips v. Pearse*, 5 B. & C. 433. (11 Eng. C. L. 264.) *Gravenor v. Woodhouse*, 1 Bing. 38. (8 Eng. C. L. 235.)

^h *Doe d. Strode v. Seton*, 1 Gale, 303. 2 C. M. & R. 728.

ter's rent to plaintiff, to whom *P.* had agreed to demise the premises for a long term. In an action by plaintiff for the succeeding quarter's rent; held, that defendant might show that the agreement between *P.* and the plaintiff was put an end to, and that the rent had been paid to *P.*^a There is a distinction between the case where a person has actually received possession from one who has no title, and the case where he has merely attorned by mistake to one who has no title. In the former case the tenant cannot (except under very special circumstances) dispute the title; in the latter he may.^b Therefore where *A.* being tenant of premises under an indenture of a lease granted by *B.*, and a sequestration out of the court of Chancery issued against the latter, and *A.* attorned to the sequestrators, to hold the premises on such conditions as might be subsequently agreed upon, it was held that *A.*, not having received possession from the sequestrators, might dispute their title.^c Where land belonging to a parish was occupied by *A.*, who paid rent to the churchwardens; they executed a lease of the same land for a term of years to *B.* and gave *A.* notice of the lease. In an action for use and occupation by *B.* against *A.*; held, that *A.* was not estopped, by having paid rent to the churchwardens, from disputing *B.*'s title, and that the latter could not derive a valid title from the churchwardens.^d

*929

Waiver of
forfeiture
is a good
defence to
ejectment
for a for-
feiture.

4.—*Waiver of forfeiture.*] When the ejectment is brought by reason of a forfeiture, a waiver of the forfeiture is a good defence to the action. Though this subject has already been considered,^e it may be here observed, that if, after the forfeiture has been incurred, the landlord having notice thereof, does any act which can be considered as an acknowledgment of a tenancy, as the receipt of rent accruing due subsequent to the forfeiture, or distraining for the same, unaccompanied with circumstances which show a contrary intention, it will operate as a waiver of the forfeiture.^f The act which is insisted on as amounting to a waiver is matter of evidence only, as to the *quo*

^a *Brooks v. Biggs*, 2 Bing. N. C. 572. (29 Eng. C. L. 426.) 1 *Hodges*, 462. *Waddilove v. Barnett*, 1 *Hodges*, 395. 4 *Dowl.* 347.

^b *Per Bayley, J.*, in *Cornish v. Searell*, 8 B. & C. 475. (15 Eng. C. L. 268.)

^c *Id.* Where a tenant, by mistake or misrepresentation, pays rent to a person not entitled to demand it, he is not precluded by such payment from giving evidence, on a plea of *non tenuit*, in replevin against the supposed landlord, to show that the latter is not entitled to the rent. *Rogers v. Pitcher*, 1 Marsh. 541. 6 Taunt. 202. (1 Eng. C. L. 355.) The defendant, in an action of ejectment, may show that the parties under whom the plaintiff's claim had no title when they conveyed to him, although the defendant himself claims by a conveyance from the same parties, if the latter conveyance was subsequent to that which the defendant seeks to impeach. *Doe d. Oliver v. Powell*, 1 Adol. & Ellis, 531. (28 Eng. C. L. 142.) 3 Nev. & M. 616.

^d *Phillips v. Pearce*, 5 B. & C. 433. (11 Eng. C. L. 264.)

^e *Ante*, 632.

^f *Goodright d. Walters v. Davis*, Cowp. 803. *Doe d. Gregson v. Harrison*, 2 T. R. 431. *Arnsby v. Woodward*, 6 B. & C. 519, (13 Eng. C. L. 241.) *ante*, 633.

animo with which it was done, to be left to the jury under the circumstances of the case.^a If a lessee exercise a trade on the premises whereby he incurs a forfeiture, the landlord does not by merely lying by and witnessing the act for six years waive the forfeiture, as some positive act of waiver is necessary; but if he permit the tenant to expend money in improvements, it is evidence of his consent to the alteration of the premises, and the jury may presume a waiver from these circumstances.^b A right of re-entry is waived by acceptance of the reserved rent though from a stranger.^c

Where a landlord, finding the premises out of repair, gave the tenant three months' notice to repair, pursuant to his covenant; held, first, that he could not maintain ejectment for a forfeiture until the three months had elapsed; and, secondly, that the notice was a waiver of the breach of the general covenant to repair.^d It seems that the acceptance of rent accruing due before the expiration of the three months is not a waiver *of the forfeiture.^e Taking a distress, though an insufficient one, is a waiver of a right, of re-entry at common law.^f But a distress is only an acknowledgment of a tenancy up to the period of the distress, and therefore only a waiver of a forfeiture previously incurred.^g

*930
Waiver of
forfeiture.

Where a lease contained a general covenant to repair, and a special covenant that the landlord might give notice to repair, and if the repairs were not done within a certain time, that he might enter, perform the repairs himself, and distrain the tenant for the expenses as for rent; the indenture also contained a general clause of re-entry in case of the non-performance of the covenants by the lessee. The landlord gave notice of repairs which were not done; he then gave notice under the special covenant, that if the repairs were not made within a certain time he should enter and repair the premises himself, and distrain on the tenant for the expenses; the tenant not having repaired the landlord brought ejectment, as upon a forfeiture; held, that the landlord by the notice under the special covenant had waived his right of entry under the general covenant; for having claimed to act under the power of making the repairs himself, he waived the forfeiture. The relation of landlord and tenant, so far from being put an end to by his notice, was affirmed by it, and the tenant was put in a totally

^a Doe d. Cheney v. Batten, Cowp. 243.

^b Doe d. Sheppard v. Allen, 3 Taunt. 78.

^c Doe d. Griffith v. Pritchard, 5 B. & Ad. 765. (27 Eng. C. L. 179.) 2 Nev. & M. 789.

^d Doe d. Morecroft v. Meux, 7 D. & R. 98. 4 B. & C. 606. (10 Eng. C. L. 417.) 1 C. & P. 346. The acceptance of rent after action brought for a forfeiture, is no waiver of a forfeiture. *Id.*

^e Doe d. Rankin v. Brindley, 4 B. & Ad. 84. (34 Eng. C. L. 28.) 1 Nev. & M. 1.

^f Brewer d. Lord Onslow v. Eaton, Adams, 174.

^g Doe d. Flower v. Peck, 1 B. & Ad. 428. (20 Eng. C. L. 417.)

different situation from that in which he would have stood had no such notice been given.^a

A forfeiture incurred by a breach of a covenant to repair generally, is not waived by notice given under a covenant to repair within three months.^b The landlord does not waive his right of re-entry by taking an insufficient distress for the rent by the non-payment of which the forfeiture was incurred;^c and where a lease contained a clause of re-entry in case the rent should be in arrear for twenty-one days and there should be no sufficient distress, it was held that the landlord having
 *931 *distrainted within the twenty-one days, and having continued in possession after the expiration of the last day for the payment of the rent did not waive his right of re-entry.^d An agreement to allow the tenant further time to repair is a suspension but not a waiver of the forfeiture.^e

When notice to quit is necessary in order to enable the landlord to maintain ejectment, an omission or waiver of such notice is a good defence.^f

The heir must show the seisin of his ancestor, and his own descent.

5.—*Evidence in ejectment by the heir.*] When ejectment is brought by the heir at law, he must show that the ancestor from whom he claims was seised of the lands in fee simple, which may be done by proving that such ancestor was in actual possession, or that he received rent from the person in possession, which is presumptive evidence of a seisin in fee,^g or that the party in possession was the lessee of the ancestor.^h The plaintiff must also show his descent from the ancestor under whom he claims; or that he, and the person last seised, were descended from one common ancestor, or at least from two brothers or sisters;ⁱ and that all the intermediate heirs between himself and such ancestor were dead without issue.^j This is done by proving the marriages, births, and deaths, necessary to complete his title, and showing the identity of the several parties. The testimony of persons present when the events happened, or who knew the parties concerned at those periods, and the production of extracts from parish registers, are the most satisfactory mode of proving facts of this nature.

Hearsay evidence.

Hearsay and reputation (which latter is the hearsay of those who may be supposed to have known the fact handed *down

^a Doe d. Rutzen v. Lewis, 2 Harr. & Wol. 166.

^b Roe d. Goatly v. Paine, 2 Camp. 520.

^c Brewer v. Eaton, cited 6 T. R. 220.

^d Doe d. Taylor v. Johnson, 1 Stark. 411. (2 Eng. C. L. 448.)

^e Doe d. Rankin v. Brindley, 4 B. & Ad. 84, (24 Eng. C. L. 28.) *supra*. Doe d. Kensington (Lord) v. Brindley, 12 Moore, 37. (22 Eng. C. L. 429.)

^f As to what operates as a waiver of notice, see *ante*, 873.

^g B. N. P. 103. Co. Litt. 15, a. Jenkins d. Harris v. Pritchard, 2 Wils. 45.

^h Co. Litt. 243, a. Bushby v. Dixon, 3 B. & C. 298. (10 Eng. C. L. 85.) The declarations of a deceased tenant, that he held under a particular person, are evidence of the seisin of that person. Peaceable v. Watson, 4 Taunt. 16. Carne v. Nicholl, 1 Bing. N. C. 430. (27 Eng. C. L. 446.)

ⁱ Roe d. Thorne v. Lord, 2 Bl. 1099.

^j Richards v. Richards, 15 East, 294.

from one to another) are admitted as evidence in cases of pedigree.^a Thus, declarations of deceased members of the family are admissible evidence to prove relationship; as who was a person's grandfather, or whom he married, or how many children he had, or as to the time of a marriage, or of the birth of a child, and the like.^b The reputation of a family may also afford presumptive evidence of the death of a person without issue.^c But hearsay evidence is not admissible to prove the place of any particular birth;^d nor are the opinions of deceased neighbors, or of the acquaintances of the family, evidence on questions of this nature;^e nor is the hearsay of a relative admissible when the relative himself can be produced.^f Declarations made on a subject in dispute after the commencement of a suit, or after a controversy preparatory to one, are not receivable on account of the probability that they were intended to serve one of the contending parties.^g

In what cases hearsay evidence is not admissible.

Entries in family bibles and other books; so also recitals in family deeds, monumental inscriptions, engravings on rings, old pedigrees hung up in a family mansion, and the like, may be received in evidence in questions of pedigree.^h Reputation is *prima facie* evidence of marriage.ⁱ It has been held sufficient in an action by the son, even where his parents were both living.^j

The presumption of the duration of life ends at the expiration of seven years from the time when the person was last known to be living.^k (1) But the death of a party may, under particular circumstances, be presumed within a shorter period; as where a *person sailed in a vessel which was never afterwards heard of, his death was presumed in three years after the sailing of the vessel, as the vessel itself was presumed to be lost.^l

Presumption of the duration of life.

*933

Proof by one of a family, that many years before, a younger brother of the person last seised had gone abroad, and that the repute of the family was that he had died there, and that the

^a Higham v. Ridgway, 10 East, 120. Whitelocke v. Baker, 13 Ves. 514. Vowels v. Young, *id.* 148.

^b B. N. P. 294. Doe d. Northey v. Harvey, R. & M. 297. (21 Eng. C. L. 443.) Doe d. Futter v. Randall, 2 M. & P. 20.

^c Doe d. Banning v. Griffin, 15 East, 293. Doe d. Oldham v. Wolley, 8 B. & C. 22. (15 Eng. C. L. 150.)

^d R. v. Erith, 8 East, 542.

^e R. v. Eriswell, 3 T. R. 707. Weeks v. Sparks, 1 M. & S. 688. Johnson v. Lawson, 2 Bing. 90. (9 Eng. C. L. 329.)

^f Pendrell v. Pendrell, 2 Stra. 925. Berkeley Peerage case, 4 Camp. 401.

^g Whitelocke v. Baker, 13 Ves. 514. Vowels v. Young, *id.* 148.

^h B. N. P. 114. Read v. Passie, Peake, 233. St. Devereux v. Much, Dew Church, 1 Bl. 367.

ⁱ Doe d. Fleming v. Fleming, 4 Bing. 266. (13 Eng. C. L. 426.)

^j Doe d. George v. Jesson, 6 East, 60. Rowe v. Hasland, 1 Bl. 404.

^k Watson v. King, 1 Stark. 121. (2 Eng. C. L. 323.)

(1) *Innes v. Campbell*, 1 Rawls, 373. *Nickle v. McFarlane*, 3 Watts, 165. *Newman v. Jenkins*, 10 Pick. 517.)

witness had never heard in the family of his having been married, is *primâ facie* evidence that the party was dead without lawful issue, to entitle the next claimant by descent to recover in ejectment.^a Where a tenant for life had not been seen or heard of for fourteen years, by a person resident near the estate on which he resided, although not a member of his family; it was held to be *primâ facie* evidence of the death of such tenant.^b

But though a person who has not been heard of for seven years is presumed in law to be dead, there is no legal presumption as to the time of his death. The fact of his being alive, or dead, at any particular period during the seven years, must be proved by the party relying on it. Therefore, where the plaintiff, in ejectment brought in 1832, claimed the premises as reversioner on the death of a party who went abroad in 1807, and had never since been heard of, the court held that it was incumbent on him to prove that the party who went abroad was alive within twenty years before the action was brought, for there was no legal presumption of the continuance of life until the end of seven years.^c

The time of death is a question of fact for the jury.

The *time* of death is a question of fact which must depend on the circumstances of each particular case. "It appears to me," said Lord Denman, C. J., "that nothing would be more absurd than that there should be a presumption of life, or death, without reference to the age, circumstances, situation of life, and common habits of the party. Can there be the same presumption as to a party who is 100 and one who is thirty-five, as to a party who was in good health when last heard of and *one who was proved to have then had a disorder upon him, which was likely speedily to terminate in his death? It cannot be, it is altogether a question of fact."^d

*934

When the lessor claims as heir to copyhold premises, he must, in addition to the foregoing evidence, produce the rolls of the manor, to show a surrender to himself or those under whom he claims; but he need not show his own admittance unless the ejectment be against the lord.^e In the latter case he must prove an admittance, or a tender thereof, and a refusal.^f

Evidence to establish illegitimacy.

6.—*Illegitimacy.*] Illegitimacy is not unfrequently a defence in actions of ejectment by heirs, which may be established by showing that the plaintiff, or some party through whom he claims, was not born in lawful matrimony;^g or (if born in wedlock) by evidence of want of access, or other cir-

^a Doe d. Banning v. Griffin, 15 East, 293.

^b Doe d. Lloyd v. Deakin, 4 B. & A. 433. (6 Eng. C. L. 476.)

^c Doe d. Knight v. Nepean, 5 B. & Ad. 86. (27 Eng. C. L. 42.)

^d In R. v. Harborne, 4 N. & M. 343. 2 Ad. & Ell. 540. (39 Eng. C. L. 161.) 1 Harr. & W. 36.

^e Doe d. Tarrant v. Hellier, 3 T. R. 162.

^f Doe d. Burrell v. Bellamy, 2 M. & S. 87.

^g As to what constitutes a legal marriage, see title Crim. Coni. post.

cumstances which tend to show that the husband could not in the course of nature be the father.*

It was formerly held, that if the husband was at all within the kingdom, at any period during the nine months, (the period of gestation,^b) or to use the technical phrase, *inter quatuor maria*, the child should be deemed legitimate, as access should be presumed; but that doctrine has been long since exploded, and it is now established by numerous decisions, that where there is a manifest physical impossibility that the husband could have procreated the child, it shall be deemed a bastard. Thus, if the husband be impotent; or if it appear that he had not such access to the wife, so that by any possibility he could be the father, the child shall be considered a bastard; and proof of these facts will be regulated by the same principles as are applicable to the establishment of any other fact.*

Want of access.

*935

If, however, such personal access between the husband and wife as afforded an opportunity of sexual intercourse, is established, a sexual intercourse will be presumed, and it will be incumbent on those who deny such intercourse, to show that it has not taken place; and if such personal access can be shown to have taken place, within such a period as by the course of nature the husband could be the father, the child will be deemed legitimate, even though the wife be notoriously living in adultery during the period of her gestation.^d The presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce can be legally resisted only by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife at any time, when by such intercourse the husband could, by the laws of nature, be the father of such child.^e But if the husband and wife be living *separately*, and she is openly carrying on an adulterous intercourse with others, a child born under such circumstances is, *primâ facie*, illegitimate even though the husband *had an opportunity* of access to her; for it will not be presumed that under such circumstances he availed himself of that opportunity.^f A child begotten after a separation *à mensa et thoro* is *primâ facie* a bastard; for access will not be presumed.^g

* R. v. Luff, 8 East, 206.

^b The usual time for a woman to go with child is forty weeks; but the period of gestation may be accelerated or retarded by accidental causes. Thus, a child born forty weeks and nine days after the death of the husband has been held legitimate. Also *v. Bowtel*, Cro. Jac. 541. So forty weeks and eleven days after his death, *id.* On this point there is no fixed rule; it is a question for the decision of the jury. See Leigh's Poor Laws, 136.

^c *Shelley v. —*, 13 Ves. 58. Banbury Peerage case, 1 Sim. & Stn. 153. *Morris v. Davies*, 3 C. & P. 215, (14 Eng. C. L. 275.) 427, (14 Eng. C. L. 378.)

^d *Cope v. Cope*, 5 C. & P. 604. (24 Eng. C. L. 475.) 1 M. & Rob. 269. *Head v. Head*, 1 Sim. & Stn. 150. *Bury v. Philpott*, 2 Myl. & K. 349.

^e Opinion of the judges in the Banbury Peerage case, *supra*.

^f *Cope v. Cope*, *supra*.

^g *St. George v. St. Margaret*, 1 Salk. 123.

When the evidence of parents is admissible.

*936

In order to bastardise issue begotten during coverture, the father or mother may be examined as to the fact or time of marriage,^a its formality or informality,^b and whether the child "was born subsequent or prior to the marriage." The evidence of the mother is admissible to prove the fact of her adultery.^d But the evidence neither of the wife^e nor of the husband, is admissible to prove non-access.^f

The declarations of the husband or wife, cannot be received after their death, to prove the want of access or to show that a child born of the wife during wedlock was not that of the husband, but of another man.^f

Proof of the execution of a will.

7.—*Devisee.*] When the plaintiff claims as devisee of a freehold, he must prove the seisin of the devisor; and if the devise be of a remainder, or a reversion in fee, or the like, he must prove the determination of all the precedent estates.^g He must also prove the due execution of the will,^h unless it be more than thirty years old, in which case it proves itself, and the age of the will is to be reckoned from its date, and not from the death of the testator.^{i, j} The original will must be produced if possible; but if it be lost an examined copy of it, or parol evidence of its contents, or the register book in which the will is set out at length, is admissible, as secondary evidence.^j But neither an exemplification under the great seal, nor the probate under the seal of the Ecclesiastical Court, can be admitted as evidence.^k

Copyhold.

When an ejectment is brought by the devisee of a copyholder, he must prove the admission of the testator, the surrender to the use of the will, and his own admittance.^l And these facts will be sufficiently established, by producing the original entries on the rolls of the manor by the proper officer, "(which entries the courts will compel the lord to permit his tenant to inspect,^m) and proving the identity of the parties admitted,ⁿ without showing a copy of such surrender and

*937

^a B. N. P. 112. Lord Valentia's case, Cowp. 593. Leigh's Poor Laws, 137.

^b *Id.* R. v. Bramley, 6 T. R. 330. ^c Stevens v. Moss, Cowp. 591.

^d *Id.* R. v. Luff, 8 East, 193.

^e R. v. Kea, 11 East, 132. R. v. Reading, 1 East, 180. R. v. Bedal, 2 Stra. 1073. In Goodright v. Moss, Cowp. 591, Lord Mansfield said, "it is a rule founded in decency, morality, and policy, that the parties shall not be permitted, after marriage, to say they had no connection."

^f Cope v. Cope, 1 M. & Rob. 296, ante, 935. R. v. Sourton, 2 H. & W. 209. 6 N. & M. 575. See Leigh's Poor Laws, 137.

^g Adams, 289.

^h See title Will, post.

ⁱ Doe d. Oldham v. Walley, 8 B. & C. 22. (15 Eng. C. L. 150.) Lord Ranelagh v. Parsons, 6 Dow. 202. M'Kenire v. Fraser, 9 Ves. 5.

^j St. Legar v. Adams, 1 Lord Raym. 731. B. N. P. 246. Doe d. Ash v. Calvert, 2 Camp. 389.

^k Comber. 46. B. N. P. 246.

^l Roe d. Jeffery v. Hicks, 2 Wils. 13. Doe d. Vernon v. Vernon, 7 East, 8.

^m Folkard v. Hemet, 2 Black. 1061. Rex v. Shelly, 3 T. R. 141.

ⁿ Doe d. Hanson v. Smith, 1 Camp. 197.

admittances stamped, as required by the stat. 55 Geo. III, c. 184.^a The will of the devisor must likewise be proved; but as copyhold lands are not within the statute of frauds, it will be sufficient to show a will in writing;^b although it be neither signed by the testator, nor attested by any witnesses.^c Indeed, even short notes taken by an attorney for the purpose of drawing up the will where the party died before the will could be completed, have been held sufficient to pass copyhold premises.^d The 55 Geo. III, c. 192, which dispenses with the necessity of the surrender of copyholds to the use of the will of the copyholder, extends to those cases only where the surrender is merely formal. Therefore, where, by the custom of the manor, a *feme covert* was allowed to pass her copyholds by will, the same being previously surrendered by the husband and wife; it was held, that a will made by a wife, without making a previous surrender, did not pass the copyholds, the surrender being matter of substance.^e

8.—*By an execution creditor.*] When an ejectment is Tenant by brought by a tenant by elegit, he must prove the judgment by elegit. producing an examined copy of the judgment roll, containing the award of the elegit and a return of the inquisition.^f If the sheriff's return do not state that he has set out a moiety by metes and bounds, it is bad, and the objection may be taken at the trial.^g If the possession be not in the debtor, but in a third person, the plaintiff must also show that such third person came in under the debtor, and that his right to possession has ceased; or if he holds adversely to the debtor, the plaintiff should show "the debtor's title."^h It will, however, be sufficient *938 to show a *prima facie* title in the debtor, and that will cast on the defendant the burden of showing that his title is anterior to the judgment.ⁱ

A lessor in ejectment who claims title as a purchaser from *Fieri facias* the sheriff who sells by virtue of a *feri facias* at the suit of *cius*. such lessor must prove the judgment as well as the writ.^j

But where the lessor of the plaintiff was not the plaintiff in the first action, it was held sufficient for him in ejectment against the defendant in the first action, to produce the *fi. fu.* without proving the judgment.^k Where the assignment of a lease by deed taken in execution was made by the under-sheriff

^a Doe d. Bennington v. Hall, 26 East, 208.

^b 32 Hen. VIII, c. 1.

^c Nash v. Edmunds, Cro. Eliz. 100. Doe d. Cook v. Danvers, 7 East, 299.

^d 1 Ander. 34. 85.

^e Doe d. Nethercote v. Bartle, 5 B. & A. 492. (7 Eng. C. L. 170.)

^f Ramsbottom v. Brickhurst, 2 M. & S. 565.

^g Fenny v. Durrant, 1 B. & A. 40. ^h Doe d. Da Costa v. Wharton, 8 T. R. 2.

ⁱ Doe v. Owen, 2 C. & J. 71.

^j Doe d. Bland v. Smith, 2 Stark. 199. (3 Eng. C. L. 312.) Hoffman v. Pitt, 5 Esp. 22.

^k Doe d. Batten v. Murless, 6 M. & S. 110.

The conu-
see of a
statute
merchant.

in the name and under the seal of office of the sheriff; it was held unnecessary to prove his authority.^a In ejectment by the conusee of a statute merchant, he must prove a copy of the statute and of the *capias si laicus*, and the extent returned and also the *liberate* returned, for an extent only gives possession in law.^b

9.—*By a mortgagee.*] In ejectment by a mortgagee against the mortgagor in possession, it is sufficient to prove the execution of the mortgage deed.^c A deed of assignment of a mortgage by demise, to which the original mortgagor, who was tenant in fee, and the mortgagee, were parties, recited the mortgage deed; held, in ejectment by the executor of the assignee of the mortgage, that this recital afforded sufficient evidence of title without producing the mortgage deed.^d If a third party be in possession as tenant to the mortgagor, the plaintiff must show a determination of the tenancy, or if such person came in subsequent to the mortgage, he must show that he has not been acknowledged by the mortgagee.^e If the tenant has a legal *title to the premises, the plaintiff cannot recover, though his only object is to get into the possession of the rents and profits.^f It must appear that the title accrued by the mortgagor's default before the day of the demise laid in the declaration.^g

Executors
and admi-
nistrators.

10.—*By an executor or administrator.*] When ejectment is brought by an executor or administrator, he must prove the testator's death, produce the probate of the will or letters of administration, or the book of the ecclesiastical court wherein they are entered, or a copy of the entry in such book, or a certificate of administration granted by such court.^h In addition to the proof of the title of the deceased, the executor may recover on a demise laid after the death of the testator, but before probate, for the term vests in him from the death of the testator;ⁱ and the same rule applies to an administrator, for the administration relates back to the intestate's death.^j

Assignees
of bank-
rupts and
insolvents.

11.—*By assignees.*] When ejectment is brought by the assignees of a bankrupt, they must prove the title of the bankrupt to the premises, and their own right to sue as assignees,

^a Doe d. James v. Brown, 5 B. & A. 243. (7 Eng. C. L. 83.)

^b B. N. P. 104.

^c Doe d. Fisher v. Giles, 5 Bing. 421. (15 Eng. C. L. 485.) Doe d. Roby v. Maisey, 8 B. & C. 767. (15 Eng. C. L. 335.) See *ante*, 877.

^d Doe d. Rogers v. Brook, 1 Har. & Woll. 400. 3 Ad. & Ell. 513. (30 Eng. C. L. 139.)

^e Thunder d. Weaver v. Belcher, 3 East, 449. Keech v. Hall, 1 Doug. 21. See *ante*, 877.

^f Doe v. Wharton, 8 T. R. 2.

^g 2 Stark. Ev. 307.

^h B. N. P. 246. Davis v. Williams, 13 East, 332. Elden v. Keddell, 8 East, 187.

ⁱ Com. Dig. Adm. B. 10. R. v. Stone, 6 T. R. 295.

^j *Id.*

if it be not admitted by the pleadings.^a The assignees of an insolvent debtor, after proving the title of the insolvent, need only produce a copy of the record of the conveyance and assignment to themselves, as filed in the insolvent court; but such copy must be written on parchment, and have the certificate of the provisional assignee of the court indorsed thereon, and be sealed with the seal of the court.^b The assignee under the compulsory clause in the lords' act, need only to produce the assignment by the prisoner, without producing the previous notices; at all events, it is sufficient if the rule for the prisoner's discharge be also produced.^c

When ejectment is brought by a guardian for the lands of an Guardians
 *infant; if by a guardian in socage, he must prove the seisin *940
 of the ancestor and the heirship of the ward, and that the ward was under the age of fourteen years at the time of the demise laid in the declaration, and that among the relations to whom the inheritance cannot descend, he himself is the next of blood to such ward.^d A guardian by will under 12 Car. II, c. 24, s. 8, must prove his appointment under a deed or the will, the title of the infant, and his minority at the time of the demise.^e

12.—*By a parson.*] In ejectment by a rector, for the parsonage-house, glebe, or tithes, proof of his admission, institution, and induction will be sufficient without showing a title in the patron.^f If the presentation be by parol, it may be proved by a person who heard it,^g if by a letter to the bishop, the letter itself should be produced.^h It is not necessary for the plaintiff to show, until the contrary is proved, that he has subscribed to the thirty-nine articles.ⁱ The induction may be proved by some person who witnessed the ceremony, or by the indorsement on the mandate of the ordinary to induct, or by the return to the mandate, if any has been made.^j The letters of institution reciting the cession of his predecessor, followed by induction, are sufficient evidence of the cession.^k

13.—*Ejectment for copyhold lands.*] When the lord of the manor brings ejectment for a forfeiture, he must prove the act of forfeiture, that he was lord at the time of the forfeiture committed, and that the tenant had been admitted on the rolls.^l When the action is brought by the surrenderee of copyhold lands, he must prove the surrender to his use, and his subsequent admittance, for his title is not complete before admit-

^a Adams, 306. See *ante*, 304. 6 G. IV, c. 16, s. 90, 92.

^b 7 G. IV, c. 57, s. 19. 1 W. IV, c. 38, s. 1.

^c Doe d. Milbourn v. Edgar, 2 Bing. N. C. 391. 1 Hodges, 431.

^d 2 Stark. Ev. 297. See *ante*, 843. ^e *Id.* Adams, 305.

^f B. N. P. 165. Snow d. Crawley v. Phillips, 1 Sid. 220.

^g R. v. Eriswell, 3 T. R. 723. Co. Litt. 120, a.

^h Powell v. Milburn, 3 Wils. 355. 2 Bl. 851. Williams v. East India Company, 3 East, 199.

ⁱ Chapman v. Beard, 3 Anstr. 942.

^j Doe d. Kirby v. Carter, R. & M. 237.

^k B. N. P. 108. Adams, 308.

*941 tance; but after admittance, his title relates back to the time of *the surrender; and provided he be admitted *before* the trial, it will be sufficient, though the demise be laid on a previous day.^a

A devisee in remainder need only prove the admittance of the tenant for life, for that operates as the admittance of him in the remainder.^b A person to whom an original grant of copyhold is made, is tenant before admittance;^c so is the grantee of a copyhold in reversion.^d The lord may admit a copyhold tenant, not only out of the court but out of the manor, but the steward cannot admit out of the manor.^e The surrender and admittance may be proved by the original entries on the court rolls of the manor, or by copies thereof properly stamped, with evidence of the identity of the parties admitted;^f or, if there be no entry on the rolls, by collateral evidence, as by the draft of the surrender from the muniments of the court, and the testimony of the foreman of the homage jury who made the presentment.^g

14.—*Who may be witnesses.*] The tenant in possession is not a competent witness to support his landlord's title, for he is interested in the event of the suit; as he may be liable for the mesne profits, and also to be turned out of possession in case of a verdict against the landlord;^h nor is he competent to prove that he and not the defendant is really the tenant, for he might be ejected from his lands in case of a verdict against such defendant.ⁱ Where a witness stated that the claimant had formerly assigned to him the premises for a particular purpose, but that he had given up the deed, and did not believe that he had any beneficial interest in them, he was held to be incompetent.^j But the acts of occupiers during their occupation are, even after it had ceased, evidence against the parties *942 *under whom they came into possession.^k So are the declarations of deceased tenants admissible for the purpose of proving that any particular lands formed part of the estate they occupied, and also to negative adverse possession.^l The mother of the defendant in ejectment, who claimed as heir to his father, is a competent witness for him, though the effect of

^a Holdfast v. Clapham, 1 T. R. 600. See *ante*, 843.

^b Auncelme v. Auncelme, Cro. Jac. 31. As to admittance of the heir, see *ante*, 842.

^c Doe d. Leach v. Whittaker, 5 B. & Ad. 409.

^d Roe d. Cosh v. Loveless, 2 B. & A. 453.

^e Doe v. Whittaker, *supra*.

^f 2 Stark. Ev. 241. Doe d. Bennington v. Hall, 16 East, 208.

^g Doe d. Priestly v. Calloway, 6 B. & B. 484.

^h Doe d. Foster v. Williams, Cowp. 621. Doe d. Lewis v. Preece, 1 C. & J. 515. Bourne v. Turner, 1 Stra. 632.

ⁱ Doe d. Lewis v. Bingham, 4 B. & A. 672. Doe d. Jones v. Wilde, 5 Taunton, 183.

^j Doe d. Scales v. Bragg, R. & M. 87.

^k Doe d. Manton v. Austin, 9 Bing. 41.

^l Davis v. Pierce, 2 T. R. 53. Outram v. Morewood, 5 T. R. 121. Doe d. Human v. Pettit, 5 B. & A. 223.

her testimony be to prove a seisin in law in her husband, which would give her a claim to dower.^a

An heir apparent may be a witness concerning the title of the land, because his heirship is a mere contingency; but a remainder-man cannot, for he hath a present estate in the land; and this rule extends to the remainder-man in tail.^b

An executor who takes a pecuniary interest under the will is a competent witness to support it, for the verdict will only have the effect of establishing the will as to the real property.^c

SECTION XV.

OF THE TRIAL, JUDGMENT, AND EXECUTION.

IF the defendant does not appear at the trial and confess lease, entry, &c., the plaintiff must be nonsuited, unless the action be at the suit of the landlord against the tenant, in which case the plaintiff may proceed with the trial, produce the consent rule,^d and prove that the tenant or his attorney has been served with due notice of the trial; after which he may go into evidence of his right to the premises, and recover the amount of mesne profits accruing from the day of the determination of the tenant's interest to the time of the verdict.^e So he may proceed for the mesne profits, in case of the appearance of the tenant at the trial; but this privilege is confined to cases where the relation of landlord and tenant exists.^f

*When the plaintiff is nonsuited in consequence of the defendant's refusal to appear and confess, &c., the cause of the nonsuit should be specially indorsed on the *postea* in order to entitle the plaintiff to have his costs taxed, and allowed on the consent rule; and also to enable him to have judgment entered against the casual ejector, if necessary.^g *943

The 11 Geo. IV, & 1 W. IV, c. 70, s. 38, enacts, "that in all cases of trials of ejectment at *Nisi Prius*, when a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of the defendant's appearance to confess lease, entry, or ouster, it shall be lawful for the judge before whom the cause shall be tried, to certify his opinion on the back of the record, that a writ of possession ought to issue immediately, and upon such certificate a writ of possession may be issued forthwith; and the costs may be taxed, and judgment signed and execu-

When a writ of possession may be immediately issued.

^a Doe d. Nitingale v. Maissey, 1 B. & Ad. 439.

^b Smith v. Blackham, Salk. 283. Doe d. Lord Teynham v. Tyler, 6 Bing. 391.

^c Doe d. Wood v. Teage, 5 B. & C. 335.

^d See *ante*, 907.

^e *Id.* Adams, 321. See *post*, 949.

^f 1 G. IV, c. 87, s. 2. See *ante*, 918.

^g Turner v. Barnaby, Salk. 250.

ted at the usual time as if no such writ had issued; provided that such writ, instead of reciting a recovery by judgment in the common form, shall recite shortly that the cause came on for trial at *Nisi Prius*, at such a time and place, and before such a judge, (naming, &c. ;) and thereupon the said judge certified his opinion that a writ of possession ought to issue immediately."

It has been held under this statute that the judge has no discretion as to the time at which the plaintiff shall have possession; he must grant a certificate to enable him to get immediate possession, or let the case take its regular course.^a But if the plaintiff be nonsuited on account of the non-appearance of the defendant, the judge will not grant a certificate without an affidavit of the circumstance.^b And where it was intimated to the judge that a new trial would be moved for, he refused to certify.^c Where, in ejectment on two demises, in separate counts, a verdict was taken for the plaintiff on one, and for the defendant on another, with leave to move to enter it for the plaintiff on a point of law, and speedy execution was given to the plaintiff; it was held, that his having accordingly issued *execution on the first count, was no bar to his also having judgment on the other.^d

*944

Of entering judgment.

On suing out a writ of *habere facias possessionem*, a *præcipe* was formerly required in the King's Bench, but not in the Common Pleas, but now, by a general rule of all the courts, this writ may be sued out without lodging a *præcipe* with the officer of the court, and without having it signed by an officer; but it shall not be sealed till the judgment paper or postea shall be seen by the proper officer.^e(1)

The interest acquired by the judgment.

By the judgment in ejectment, the plaintiff's lessor obtains possession of the lands recovered by the verdict, but does not acquire any title thereto, except such as he previously had. If, therefore, he have a freehold interest in them, he is in as a freeholder; if he have a chattel interest, he is in as a termor; and if he have no title at all, he is in as a trespasser, and liable to account for the profits to the legal owner, without any re-entry on his part:^f the verdict in the ejectment being no evidence in a subsequent action, even between the same parties.^g

The plaintiff should take care not to take out execution for

^a Doe d. Williamson v. Dawson, 4 C. & P. 589. (19 Eng. C. L. 539.) Doe d. Packer v. Hilliard, 5 C. & P. 132. (24 Eng. C. L. 244.)

^b Doe v. Dawson, *supra*.

^c Doe d. Cook v. Barrett, Tidd, N. Prac. 628.

^d Doe d. Bank of England v. Chambers, 4 Add. & Ell. 410. (31 Eng. C. L.) 1 H. & W. 749.

^e R. H. 2 W. IV, reg. 1, sec. 75, c. 16. Tidd's New Prac. 629.

^f Taylor d. Atkins v. Hordo, 1 Burr. 60.

^g Clerke v. Rowell, 1 Mod. 10.

(1) (Where there are many defendants whose possession is several, judgment should be entered against each separately. Bayard v. Colefax, 4 Wash. C. C. Rep. 38. Jackson Andrews, 7 Wend. 152.)

more than he had a right to recover; if he does the court will set it right in a summary way. As where in ejectment for five-eighths of a cottage, the sheriff gave possession of the whole; held, that the tenant should be restored to his possession of three-eighths of the premises.^a It is now the practice for the plaintiff to give the sheriff security to indemnify him from the defendant, and then for the sheriff to give possession of what the plaintiff demands.^b

If a party who recovers in ejectment takes possession of the premises without the intervention of the sheriff, the court will award a writ of restitution.^c

The plaintiff having judgment to recover his term may enter without suing out a writ of execution; for where the land recovered is certain, he may enter at his own peril; the assistance of the sheriff is only to preserve the peace.^d If the plaintiff obtains a verdict and judgment against the landlord, execution *may be issued without any further order of the court. But when the landlord is admitted to defend, and judgment is entered against the casual ejector, with a stay of execution until a further order, the plaintiff cannot take out execution without having moved the court for leave to do so, and if he sue out execution without leave, the court will set it aside for irregularity; the rule is, in the first instance, only a rule to show cause.^e

The sheriff must give full and actual possession; if he meet with any obstruction he may call out the *posse comitatus* to assist him. If the recovery be of a house, he may justify breaking open the door. If the lessor recover several messuages in the possession of different persons, the sheriff must go to each of the several houses, and severally deliver possession thereof, (which is done by turning out the tenants,) for the delivery of the possession of one messuage, in the name of all, is not a good execution of the writ; since the possession of one tenant is not the possession of the other.^f But when the several messuages are in the possession of one tenant only, it is sufficient if he give possession of one messuage in the name of all.^g After possession once given under a writ, the plaintiff cannot sue out another writ of possession, though he be disturbed by the same defendant, and though the sheriff have not yet returned the former writ.^h(1)

^a Roe d. Saul v. Dawson, 3 Wils. 49. ^b Adams, 342.

^c Doe d. Stephens v. Lord, MS. Q. B. M. T. 1837.

^d Run. 424.

^e Doe d. Lucy v. Bennett, 4 B. C. 897. (10 Eng. C. L. 466.) Doe d. Roberts v. Gibbs, 1 Chitty, 47. (18 Eng. C. L. 25.) Doe v. Masters, *id.* 233. (18 Eng. C. L. 70.)

^f Roll. Ab. 886.

^g Semayne's Case, 5 Co. 91. Adams, 342.

^h Doe d. Pate v. Roe, 1 Taunt. 55.

(1) (*United States v. Slaymaker*, 4 Wash. C. C. Rep. 169. *Jackson v. Hawley*, 11 Wend. 182.)

If the lessor neglect to sue out his writ of possession for a year and a day after judgment, he must revive the judgment by *scire facias*, as in other cases; and when the judgment is against the casual ejector, the tenant must be joined in the writ.^a By the execution of the writ of possession growing crops will pass to the lessor of the plaintiff, although previously seized under a *fi. fa.* against the tenant, if the day of the demise be prior to the issuing of such *fi. fa.*, for they cannot be said to belong to the tenant, who was a trespasser from the day of the *demise.^b Where several crops were taken under an *habere facias possessionem*, issued in an ejectment brought against a tenant for holding over, the court refused a rule for the lessors of the plaintiff to pay over the value of them to the defendant after deducting the amount of rent due.^c

SECTION XVI.

COSTS.

How costs are recoverable. WHEN the action is undefended, and judgment is entered against the casual ejector, the only remedy which the lessor of the plaintiff has for his costs, is an action for the mesne profits, in which they are recoverable as consequential damages. When the tenant appears and enters into the consent rule, and afterwards at the trial refuses to confess, he is liable, upon such consent rule, to the payment of costs, and an attachment may be issued against him if he refuse or neglect to pay them.^d When the tenant appears, and there is a verdict and judgment against him, execution may be taken out thereon for the costs, as in ordinary cases. If there be several defendants, some of whom appear at the trial and confess, but others do not appear, and a verdict is found against those who do appear, each defendant is liable for the whole costs, and the plaintiff's lessor may tax them all against any one or all of the defendants at the same time.^e

Who is liable to pay costs. In ejectment, the court will compel the real defendant to pay the costs, although he is not a party on the record.^f Therefore where three ejectments were brought against a landlord and his two tenants, and the landlord obtained a rule for the

^a Withers v. Harris, 2 Lord Raym. 806.

^b Hodgson v. Gascoigne, 5 B. & A. 88. (7 Eng. C. L. 35.)

^c Doe d. Upton v. Witherwicke, 3 Bing. 11. (11 Eng. C. L. 8.) 10 Moore, 267.

^d Adams, 334. An attachment will be issued for not paying costs in ejectment on the master's allocatur after judgment as in case of nonsuit, though no subpoenas solvas has issued against the nominal plaintiff. Doe d. Floyd v. Roe, 4 Tyr. 85. S. C. nom. Doe d. — v. Baker, 2 Dowl. 217. Doe d. Fry v. Fry, 2 C. & M. 234. 2 Dowl. 265.

^e *Id.* B. N. P. 35.

^f Doe d. Masters v. Gray, 10 B. & C. 615. (31 Eng. C. L. 138.)

consolidation of the three actions, by which a verdict in one *was to govern the others, the plaintiff having obtained a verdict against one of the tenants, who was a pauper, the court held, that the landlord was liable to pay the costs of that one.* *947

By Reg. Gen. H. T. 2 W. IV, reg. 74, "no costs shall be allowed on taxation to a plaintiff upon any counts or issues on which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." This rule extends to give to defendant the costs of an issue found for him on a demise in ejectment, which the lessor of the plaintiff abandoned at the trial, though the evidence was equally applicable to the demise upon which he succeeded. It is not necessary under the terms of the rule, that the costs should be confined exclusively to the issue found for the defendant; but the question of amount is entirely a question for the master, with which the court will not interfere.^b Where there was but one count, and the lessor of the plaintiff recovered judgment for part only of the lands claimed, the defendant succeeding as to the chief question in dispute; held, that the defendant was entitled to have his costs, as to the part found for him, set off against the costs of the lessor of the plaintiff.^c

Where twelve defendants entered into a joint consent rule; shortly before the trial, by a judge's order, two were permitted to withdraw their plea, and suffer judgment by default. At the trial, the two did not appear when called on; held, that the plaintiff was entitled to a general judgment against all the defendants, they receiving the costs of that defence which, as to a part of the premises, was successful.^d

When a verdict is found for the defendant, or the plaintiff is nonsuited for any other cause than the defendant's not confessing lease, &c., the defendant must tax his costs on the *postea* as in other actions, and sue out a *ca. sa.* or a *fi. fa.* for the same against the plaintiff, and if upon showing this writ under seal to the lessor, serving him with a copy of the consent rule, and *demanding the costs, the lessor do not pay them, the court will, on an affidavit of the facts, grant an attachment against him.* *948

When there are several defendants, the lessor of the plaintiff has his election to pay costs to which defendant he pleases.^e If the plaintiff proceeds under 1 Geo. IV, c. 87, s. 1, and is nonsuited on the merits, or has a verdict pass against him, the defendant is entitled to double costs.^f

^a Thrustout d. Jones v. Shenton, *id.* 110. (21 Eng. C. L. 35.)

^b Doe d. Smith v. Payne, or Webber, 1 Harr. & Woll. 10. 1 Ad. & Ell. 448. (29 Eng. C. L. 139.) 4 N. & M. 381.

^c Doe d. Errington v. Errington, 1 H. & W. 502. 4 Dowl. 602.

^d Doe d. Bishton v. Hughes, 1 Gale, 263. 2 C. M. & R. 281.

^e Adams, 337.

^f Jordan v. Harper, Stran. 516.

^g 1 G. IV, c. 87, s. 6.

SECTION XVII.

WRIT OF ERROR.

A WRIT of error cannot be brought in the name of the casual ejector, and if the defendant refuse at the trial to confess, &c., he will be precluded from bringing error, because the plaintiff will then be nonsuited as to him, and the judgment will be entered against the casual ejector.^a

By 16 & 17 Car. II, c. 8, s. 3, no execution shall be stayed by writ of error, upon any judgment after verdict in ejectment, unless the plaintiff in error shall become bound in a reasonable sum^b to pay the plaintiff in ejectment all such costs, damages, and sums of money, as shall be awarded to such plaintiff, upon judgment being affirmed, or on a nonsuit, or discontinuance had. Though the words of the statute seem to require that the plaintiff in error should be personally bound, yet by a reasonable construction it has been held to be sufficient if he procure proper sureties to enter into recognisance.^c

Although the sureties may be examined as to their sufficiency, the plaintiff in error cannot; and, therefore, where the lessor of the plaintiff swore, that the defendant was insolvent, and also that he (the lessor) had a mortgage upon the land for more *949 *than it was worth, the court still held, that the defendant's recognisance was sufficient to entitle him to a writ of error.^d

Under 1 Geo. IV, c. 87, s. 3, the defendant must give two additional sureties on bringing error, although he has before given two sureties on commencing the action.^e

The plaintiff in error is not bound to give the defendant notice of his entering into the recognisance pursuant to 16 & 17 Car. II.^f The writ of error does not operate as a stay of proceedings until bail is put in, which cannot be done until the plaintiff has taxed his costs; for until then the amount of the penalty of the recognisance cannot be fixed.^g

Where the defendant brought a writ of error in parliament, the court compelled him to enter into a rule not to commit waste or destruction during the pending of the writ of error.^h

As the plaintiff in ejectment is always a fictitious person, and

^a Adams, 348. By 11 G. IV & 1 W. IV, c. 70, s. 8, all writs of error, from any of the superior courts, are to be returnable only in the Court of Exchequer Chamber in the first instance.

^b This reasonable sum is double the yearly value, and double costs of the action. Reg. Gen. H. T. 2 W. IV.

^c Keen d. Lord Byron v. Deardon, 8 East, 298.

^d Thomas v. Goodtitle, 4 Burr. 2501.

^e Doe d. Durrant v. Moore, 7 Bing. 124. (20 Eng. C. L. 73.)

^f Doe d. Webb v. Goundry, 7 Taunt. 427. (2 Eng. C. L. 164.)

^g Doe d. Messiter v. Dinely, 4 Taunt. 289.

^h Wharod v. Smart, 3 Burr. 1823.

as the demise, term, &c., may be laid many different ways, the judgment in this action can never be final, for it cannot be made appear that the second ejectment is brought upon the same title as the first. A judgment in ejectment is not admissible in evidence in a subsequent action even between the same parties. It follows, therefore, that the unsuccessful party, whether plaintiff or defendant, may bring a new action; but after three or four actions, in case of a vexatious prosecution of ejectment, the court of Chancery has sometimes interfered, to establish the title of the prevailing party, by granting a perpetual injunction restraining the other party from any further proceedings in ejectment.^a

When a court of equity will restrain a party from bringing further ejectments.

SECTION XVIII.

TRESPASS FOR MESNE PROFITS.

THE action of ejectment being a fictitious proceeding, the plaintiff is entitled to nominal damages only; for the real damage *which he has sustained in consequence of the *tortious* *950 possession of the defendant, the law has provided another remedy, by an action of trespass *vi et armis*, generally termed an action for mesne profits, which may be brought by the plaintiff, in his own name, or in that of the nominal lessee, against the tenant in possession; it is however usual, and indeed more advantageous, to bring the action in the name of the lessor of the plaintiff, as he may then upon proper proofs recover damages for the rents and profits received by the defendant anterior to the day of the demise in the ejectment, which cannot be done in an action at the suit of the nominal lessee.^{b(1)}

A joint action for mesne profits may be supported by several lessors of a plaintiff in ejectment, after a recovery therein; although there were only separate demises by each.^c So an action for mesne profits lies where one tenant in common recovers against another in ejectment by default.^d

It is, however, doubtful whether the action can be maintained

^a Barefoot v. Fry, Bunb. 158. Leighton v. Leighton, 1 P. Wms. 671. Earl of Bath v. Sherwin, Bro. Cas. Parl. 370.

^b B. N. P. 87. Adams, 382. Though it was formerly doubted, it is now settled, that an action of trespass for mesne profits (including the costs of the ejectment) may be brought in the name of the lessee against the tenant in possession, after judgment by default as well as after judgment upon verdict. Aslin v. Parkin, 2 Burr. 665. 2 Lord Kenyon, 276. S. P. Gulliver v. Drinkwater, 2 T. R. 261.

^c Chamier v. Llingon, 2 Chitty, 410. (18 Eng. C. L. 382.)

^d Goodtitle v. Tombes, 3 Wils. 168.

(1) (Lloyd v. Nourse, 2 Rawls, 49. Jeffries v. Lane, 1 Miles, 287. Morgan v. Varick, 8 Wend. 587.)

against a tenant for the holding over of his undertenants, for it should be brought against the person in actual possession and trespassing.^a But any person so found in possession after a recovery in ejectment is liable to the action; and it is no defence to say that he was upon the premises as the agent and under the license of the defendant in ejectment, for no man can license another to do an illegal act.^b

The action for mesne profits may be brought pending a writ of error in ejectment, and the plaintiff may proceed to ascertain his damages, and to sign his judgment; but the court will stay execution until the writ of error is determined.^c

Declara-
tion.

*951

The declaration in this action should state the time when the defendant ejected the plaintiff out of the premises, and the length of time he was kept out of possession, otherwise it will be bad on special demurrer, though cured by verdict or judgment by default.^d It should also state the different parcels of land from which the profits arose. It is usual to adopt the description of the premises which was given in the declaration in the ejectment.^e In the statement of damages the costs should be included; and if any particular waste or injury was done to the premises by the defendant, it should be specially stated.^f

Pleadings

The general issue is *not guilty*; under this plea the defendant cannot give in evidence that the plaintiff accepted the rent of the premises for the time in dispute, and agreed to waive the costs of the ejectment.^g As the damages are unliquidated, bankruptcy is no answer to this action,^h nor can a discharge under the insolvent debtors' act be pleaded in bar.ⁱ But the statute of limitations may be pleaded to a demand for mesne profits accruing more than six years before the commencement of the action.^j

Evidence.

When the plaintiff proceeds only for the recovery of *mesne profits* accruing subsequent to the day of the demise in the declaration, it is sufficient for him to produce the judgment in ejectment, and prove the value of the profits. It was formerly considered that the judgment in ejectment was conclusive evidence of the plaintiff's right of possession at the time of the demise in the declaration.^k But in a recent case, where the declaration was in the ordinary form, and the defendant pleaded, that as to all trespasses alleged to have been committed before 1834, the plaintiff had no title to the possession of the land at that time; and as to all subsequent tres-

The judgment in ejectment is not conclusive evidence of the plaintiff's right to the premises, un-

^a Burne v. Richardson, 4 Taunt. 790.

^b Girdlestone v. Porter, Woodf. L. & T. 673.

^c 2 Sell. Prac. 226. Adams, 384.

^d Higgins v. Highfield, 13 East, 407. 4 Ann. c. 16.

^e 1 Ch. Pl. 196.

^f Doe v. Leo, 4 Taunt. 459.

^g *Id.* Adams, 385.

^h Goodtitle v. North, Doug. 584.

ⁱ Lloyd v. Peel, 3 B. & A. 407. (5 Eng. C. L. 329.)

^j B. N. P. 88.

^k Aslin v. Parkin, 2 Burr. 665. B. N. P. 87. And see Bird v. Randall, 3 Burr. 1345. Dodwell v. Gibbs, 2 C. & P. 615. (19 Eng. C. L. 289.)

passes, he paid money into court, and denied damages ultra that sum; at the trial the judgment in ejectment, which had been suffered by default, was produced in evidence. The record contained two demises, one in 1834, and one at an earlier period. The defendant proposed to show by evidence that the title of the plaintiff did not accrue before 1834; but the judge rejected the evidence on the ground that the judgment was conclusive against the defendant. The Court of Exchequer, however, held that the evidence was irresistible, on the ground that a judgment between the same parties was not conclusive unless pleaded as an estoppel, such being the general rule of law since the decision of *Voth v. Winet*,^a which was not distinguishable in principle from the present case. Mr. Baron Bolland, in delivering the judgment of the court, said that the *dicta* of Lord Mansfield, in *Aslin v. Parkin*, and in *Bird v. Bardall* were not entitled to much weight, because they might be explained on the supposition that the point was not specifically presented to the court.^b

less pleaded by way of estoppel. *952

In case of judgment by default against the casual ejector, no rule having been entered into, the plaintiff must also produce the writ of possession executed,^c which is done by producing an examined copy of the writ, and of the sheriff's return. But if the plaintiff has been let into possession by the defendant he need not prove the execution of the writ of possession.^d

Where the premises were in the possession of a tenant, and there was judgment in ejectment against the casual ejector; in an action against the landlord for the mesne profits and costs of the ejectment, it was held that the judgment in ejectment was no evidence against him, without proof that he had notice of the ejectment, so that he might have come in to defend it; but a subsequent promise by him to pay the rent and costs was held to amount to an admission that he was liable to the action.^e

Judgment in ejectment is evidence only against the parties who are privy thereto; it is therefore not evidence against a previous occupier;^f nor is judgment against the wife, evidence against the husband, for the wife's confession of a trespass committed by her cannot be evidence to affect her husband in an action in which he is liable for the damages and costs.^g But it is evidence against a person who comes in under the defendant pending the judgment in the ejectment.^h A judgment in ejectment on the several demises of two, will be evidence in an action of trespass brought by them jointly.ⁱ The consent rule

When judgment in ejectment is admissible in evidence. *953

^a 2 B. & A. 670.

^b *Doe v. Huddart*, 2 C. M. & R. 316. 1 Gale, 260.

^c B. N. P. 87.

^d *Calvert v. Horsefall*, 4 Esp. 67.

^e *Hunter v. Britta*, 3 Camp. 455.

^f B. N. P. 87.

^g *Denn v. White*, 7 T. R. 119.

^h *Doe d. Whitcomb*, 8 Bing. 46. (21 Eng. C. L. 216.)

ⁱ *Chamier v. Clingo*, 5 M. & S. 64.

admits the possession at the time of the service of the declaration in ejectment; but if the plaintiff intends to go for *mesne* profits, antecedent to that time, he must give distinct evidence of the defendant's possession,^a and also give evidence of his own title.^b

Damages and costs. As this is an action of trespass *vi et armis*, the jury may give such damages as in their opinion the circumstances of the case require. If the ejectment has been defended, the taxed costs only, and not the extra costs are recoverable.^c In one case, however, the court allowed the plaintiff to recover the full costs as between attorney and client, of reversing in a court of error a judgment for the defendant in the ejectment, although they were costs which the court of error had no power to allow.^d Where the defendant has appeared and pleaded in ejectment, the costs may be recovered though they have not been taxed.^e

When a landlord proceeds against his tenant, pursuant to the provisions of 1 G. IV, c. 87, we have seen^f that he *may* recover the *mesne* profits in the action of ejectment, accruing due from the day of the determination of the tenancy, until the day of the *trial* or a *preceding day* to be specially mentioned therein. It is, however, optional with him to adopt that mode of proceeding, or to bring an action for the *mesne* profits; and *954 *if he does resort to the former mode, he will not thereby be precluded from bringing trespass for the subsequent profits; for the act provides, "that nothing therein contained shall bar the landlord from bringing trespass for the *mesne* profits which shall accrue *from the verdict or the day so specified*, down to the day of the delivery of possession of the premises recovered."^g

^a *Dodwell v. Gibbs*, 2 C. & P. 615. (12 Eng. C. L. 289.)

^b B. N. P. 87.

^c *Brook v. Bridges*, 7 Moore, 471. (17 Eng. C. L. 86.)

^d *Nowell v. Roake*, 7 B. & C. 404. (14 Eng. C. L. 61.)

^e *Symonds v. Page*, 1 C. & J. 29. ^f *Ante*, 918.

^g 1 G. IV, c. 87, s. 3.

*CHAPTER XII.

EXECUTORS AND ADMINISTRATORS.

	PAGE
I. Who may be an executor.	
II. Of an executor <i>de son tort</i> .	957
III. Who may be an administrator.	962
IV. Administration <i>cum testamento annexo</i> .	963
V. ————— <i>de bonis non</i> .	964
VI. Of limited or temporary administration.	965
VII. Of <i>bona notabilia</i> .	968
VIII. Of the interest which an executor or administrator takes in the estate of the deceased.	972
IX. Of the disposition of the estate of the deceased.	975
X. Of the liability of an executor or administrator in respect of the acts of the deceased.	984
XI. Of his liability in respect of his own act.	987
XII. Of actions by executors and administrators.	993
XIII. Of actions against executors and administrators.	1002
XIV. Admission of assets.— <i>Devastavit</i> .	1006
XV. Costs.	1009
XVI. Judgment.	1011
XVII. Administration bond.	1019

SECTION I.

WHO MAY BE AN EXECUTOR.

An executor is a person to whom the execution of a last will and testament of personal estate is by the testator's appointment confided; and all persons are capable of being executors who are capable of making wills, and many others besides.^a An infant may be an executor, how young soever he be, and so may a child in *ventre sa mere*.^b But if an infant be appointed sole executor, by 38 Geo. III, c. 87, s. 6, he is altogether disqualified from exercising his office during his minority, and administration *cum testamento annexo* shall be granted to his guardian, or such other person as the spiritual court shall think fit, until such infant shall attain the age of twenty-one. This act applies only where an infant is sole executor, for if there be several executors, and one of them is of full age, he may execute the will.^c A married woman may be an executrix, but she cannot take on herself the office without the consent of her husband.^d

^a 2 Bl. Com. 503.^b *Id.* Wentw. Off. Ex. c. 18.^c Pigot & Gascoigne's Case, Brownl. 46. Foxwist v. Tremaine, 1 Mod. 47.^d Thrustout v. Coppin, 2 Bl. 801. Taylor v. Allen, 2 Atk. 213. 3 Bac. Ab. tit. Executors, A. 8.

Persons attainted and outlawed may sue as executors, because they sue in *autre droit*.^a The Ecclesiastical Court cannot refuse to grant the probate of a will to an insolvent or a bankrupt.^b But the Court of Chancery will restrain an insolvent from acting as executor, and appoint a receiver.^c An alien,^d or corporation, may be an executor;^e but idiots and lunatics are incapable of being executors or administrators.^f

When there is a sole executor, his executor represents the testator; but if the first executor dies intestate, his administrator is not such representative; but an administrator *de bonis non* of the original testator must be appointed by the ordinary.^g If the first executor should die without having proved the will, the executorship is determined, and an administrator *cum testamento annexo* must be appointed.^h

If there are several executors, the interest is transmissible to the executor of the surviving executor only, unless he dies intestate, in which case an administrator *de bonis non* must be appointed.ⁱ

The person nominated executor in the will of the testator, *may refuse to accept the office.^j But the ordinary may summon such person before him, with intent to prove or refuse the testament, within any time which he may think proper,^k and if he refuses, administration *cum testamento annexo* will be granted to another.^l The refusal must be by some act entered or recorded in the spiritual court; but if the executor sends a letter to the ordinary, by which he renounces, it will be sufficient.^m (1) An executor cannot in part refuse, he must refuse entirely or not at all.ⁿ If a sole executor renounces, he cannot afterwards retract, and be admitted to take probate as executor; but if one or more out of several executors prove the will, and others renounce, those who renounced it may

An executor may refuse to accept the office.

*957

^a *Hix v. Harrison*, 3 Bulst. 219. *Caroon's Case*, Cro. Car. 9. *Wms. Executors*, 119.

^b *R. v. Raines*, 1 Lord Raym. 361. *Hathornthwaite v. Russell*, 2 Atk. 127. *Hill v. Mills*, 1 Show. 293. 1 Salk. 36.

^c *Uterson v. Mair*, 2 Ves. Jun. 95. *Scott v. Becher*, 4 Price, 346.

^d *Caroon's Case*, Cro. Car. 8. Co. Litt. 129, n.

^e *Wms.* 114.

^f *Id.* 121.

^g *Id.* 133. Com. Dig. tit. Admin. B. 6. *Wankford v. Wankford*, 1 Salk. 308. 2 Bl. Com. 506. *Tingrey v. Brown*, 1 B. & P. 310. It seems that where a testator's will is proved in a prerogative court, and his executor's will in a diocesan court, the executor of the executor is not the personal representative of the original testator. *Jernegan v. Baxter*, 5 Simon. 568.

^h *Day v. Chatfield*, 1 Vern. 200. *Hayton v. Wolfe*, Cro. Jac. 614. *Isted v. Stanley*, Dyer, 372.

ⁱ *Wentw. Off. Ex.* 215.

^j By stat. 21 Hen. VIII, c. 5, s. 8. 53 G. III, c. 127.

^k *Swinb.* pt. 6, s. 4. *Wms.* 147.

^l *Id.*

^m *Broker v. Charter*, Cro. Eliz. 22. *Wentw. Off. Ex.* 88.

ⁿ *Paule v. Moodie*, 2 Roll. 132.

(1) (Any writing which shows the intention of the executor will be a sufficient renunciation, provided it be filed in the proper office. *Com. v. Mateer*, 16 S. & R. 416.)

assume the executorship after the death of their co-executors who took out probate, though those who renounced had never before acted.^a(1)

Although an executor may accept or renounce the executorship at his option, yet if he once administers, or intermeddles with the effects of the testator, the ordinary may compel him to prove the will;^b and if he administer, and omit to take probate within six months after the death of the deceased, he will forfeit 100*l.*, and 10*l.* per cent. on the duty.^c

SECTION II.

OF AN EXECUTOR DE SON TORT.

If any person, without just authority, take upon himself to What constitutes an executor de son tort,
act as executor, by intermeddling with the goods of the deceased, he is called an executor of his own wrong, or more usually, executor *de son tort*; and he is liable to all the troubles of an executorship without any of the profits or advantages.^d
*A very slight circumstance of intermeddling with the effects of the deceased will make a person executor *de son tort*, as milking a cow, even by the widow of the deceased, or taking a dog.^e So if a man kills the cattle, or disposes of the goods,^f or takes them in satisfaction of his own debt or legacy,^g or exercises any right in respect of them, by taking possession of them or otherwise, it will be sufficient to constitute him executor *de son tort*.^h Living in the house, and carrying on the trade of the deceased as a victualler, has been held sufficient, where the person's wife, who was daughter of the deceased,

*958

^a R. v. Simpson, 3 Burr. 1463. Cottle v. Aldrich, 4 M. & S. 177. Arnold v. Blencoe, 1 Cox, 426. House v. Lord Petre, 1 Salk. 311.

^b Wickenden v. Thomas, 2 Brownl. 58. Graysbrook v. Fox, 1 Plowd. 260. Swinb. pt. 6, s. 2.

^c 55 G. III, c. 184, s. 37.

^d 2 Bl. Com. 507. Swinb. pt. 4, s. 23. Wms. 136. The law knows no such appellation as administrator *de son tort*. Godolph. pt. 2, c. 8, s. 2.

^e Dyer, 166.

^f Padget v. Priest, 2 T. R. 97. Swinb. pt. 4, s. 3.

^g Wms. 137.

^h Wentw. Off. Ex. c. 14, 324. Swinb. pt. 4, s. 23. Read's Case, 5 Co. 23, b. Mayor of Norwich v. Johnson, 3 Lev. 35.

(1) (Though before granting the letters of administration, *cum testamento annexo*, the executors may act notwithstanding the renunciation; yet, after they are granted, it is incompetent to them to resume their trust during the life time of the administrators. *Com. v. Masear*, 16 S. & R. 416. Where there are several executors, and one renounces, and the others prove the will, he who renounces may at any time afterwards come in and administer. *Ex parte Tugger*, 1 Ashmead, 321. *Gallagher v. Gallagher*, 6 Watts, 473.)

proved the will, after the action was commenced, and she and her husband were in the house before the death of the testator.^a

To make a man liable as executor *de son tort*, it is not essential that the dealing with the chattels of the deceased should be in the character of executor; therefore, where a party had received possession of goods from the widow of a deceased person, being aware at the time that they were the property of the deceased; held, that it was sufficiently an intermeddling to make him liable as an executor *de son tort*.^b And even the possession of goods which the defendant had received from the deceased in his lifetime, under a colorable sale, may be sufficient to charge him as an executor *de son tort*.^c So if the deceased make a deed of gift, or bill of sale, of his effects to B., in fraud of his creditors, and B., after the death of the donor, disposes of those goods, it is sufficient to constitute him executor *de son tort*.^{d(1)}

*959 But if the will be proved, or administration taken out, and a stranger takes the goods, and claiming them as his own, uses and disposes of them; this will not make him executor *de son tort* in construction of law, because he is liable to be sued as a trespasser by the rightful executor.^e But if a stranger takes the goods, and *claiming to be executor*, pays the debts, or intermeddles as executor, he may be charged as executor of his own wrong, even though there was an executor regularly appointed.^f

Acts of kindness or charity do not make a person executor in his own wrong, as directing the funeral of the deceased, feeding his cattle, repairing his houses, or finding necessities for his children.^{g(2)} A person who takes possession of the effects of the deceased under the authority of the rightful executor, cannot be charged as executor *de son tort*.^h But if he continues to exercise any authority upon the goods after the death of such executor he is chargeable as executor *de son tort*, though he act under the advice of another executor, who has not proved or administered.ⁱ

A person who is permitted by an executor to possess himself of part of the assets of a testator, who after the executor's death, and when there is no legal personal representative either

^a Hooper v. Summersett, Wight. 16.

^b Seally v. Powis, 1 Harr. & Woll. 2.

^c *Id.*

^d Edwards v. Harber, 2 T. R. 587. Hawes v. Leader, Cro. Jac. 271. Wms. 139. By the 43 Eliz. c. 8, any person fraudulently obtaining any goods of any intestate, or a release or discharge of any debt that belonged to the intestate, shall be deemed an executor of his own wrong.

^e Godolph. pt. 2. c. 8, s. 3. Wms. 139.

^f Read's Case, 5 Co. 34, a. Com. Dig. Adm. (c. 1.) But in Hall v. Elliott, Peake, 87, Lord Kenyon said, that it was impossible there should be a lawful executor and an executor *de son tort* at the same time.

^g Godolph. pt. 2. s. 8. Wms. 140.

^h Hall v. Elliott, *supra*.

ⁱ Cottle v. Aldrich, 4 M. & S. 175.

(1) (Stackton v. Wilson, 3 Penn. R. 129.)

(2) (Glenn v. Smith, 2 Gill. & Johns. 493.)

of the testator or executor, retains the assets and acts in execution of the trusts of the will, is not an executor *de son tort* to the original testator.^a

Where *A.* had pledged goods to *B.* for a debt; *B.* died, and the parish officers took the goods and gave them to *J.* the carpenter who made the coffin for *B.*, on condition of his paying *B.*'s rent and the funeral expenses; held, that by taking these goods, the parish officers became executors *de son tort*; and that, if they sold the goods to *J.*, they would be liable to *A.* in trover, because such a sale was so inconsistent with the bailment as to revest the right of possession in *A.* But if the parish officers merely relinquished their possession and let *J.* take possession, this would not make the parish officers liable *in trover, as in this case, a mere seizure of the goods by a stranger, who afterwards relinquished them, would not be a conversion.^b *960

What acts make a person liable as an executor *de son tort*, is a matter of law for the court to decide; but it is for the jury to say whether the acts be sufficiently proved.^c If a person sets up in himself a colorable title to the goods of the deceased it is sufficient to exempt him from being charged as executor *de son tort*, although he be not able to establish a complete legal title.^d

An executor *de son tort* renders himself liable, not only to an action by the rightful executor, or administrator, but also to be sued as executor by a creditor or legatee of the deceased. If, in an action by a creditor, he pleads *ne unques* executor, and it be found against him, the judgment will be *de bonis testatoris, et si non, de bonis propriis*.^e But if he pleads properly, he is not liable beyond the extent of the goods which he has wrongfully administered. Under a plea of *plene administravit*, he shall not be charged beyond the assets which came into his hands;^f and in support of this plea, he may give in evidence the payments by himself of the just debts of the deceased;^g(1) or that he has delivered the assets to the rightful executor or administrator *before* action brought;^h but such delivery *after* action brought would not be sufficient.ⁱ

An executor *de son tort* cannot, as against a creditor of the deceased, retain for his own debts, even though of a higher

^a Tomlin v. Beck, 1 Russ. & Tur. 438.

^b Samuel v. Morris, 6 C. & P. 620. (25 Eng. C. L. 565.)

^c Padget v. Priest, 2 T. R. 99.

^d Fennings v. Jarrat, 1 Esp. 335.

^e Wms. 141. Bac. Ab. Executors, (B. 3.)

^f 1 Saund. 336, b. 1 Went. 331.

^g Id. 1 Saund. 265. Dyer, 166, b.

^h Mountford v. Gibson, 4 East, 453. 2 Bl. Com. 508. 1 Went. 333. Bac. Ab. Executors, (B. 3.) 2.

ⁱ Anon. 1 Salk. 313. Padget v. Priest, 2 T. R. 97. Per Lord Kenyon, in Curtis

v. Vernon, 3 T. R. 590.

^j Id. 587. Affirmed in Error, 2 H. Bl. 18.

(1) (Glenn v. Smith, 2 Gill. & Johns. 493.)

- degree, and though the rightful executor or administrator has assented to such retainer.*⁽¹⁾ But even after action brought
- *961 by a simple contract creditor, he may pay a specialty debt, and plead it in bar of the action.^b

If an executor *de son tort* be sued by a rightful representative, in an action *ex delicto*, he may, under the general issue, give in evidence, *in mitigation of damages*, payments made by him in the rightful course of administration; but he cannot plead such payments in bar of the action; and though the payments proved to have been made by him, amount to the full value sought to be recovered, still the plaintiff will be entitled to nominal damages.*⁽²⁾ But such payments will not be allowed in damages if there be a failure of assets, as the lawful executor would, by these means, be deprived of his right of preferring one creditor to another of equal rank, or of giving himself the same preference.^c And where an executor proved a will, and the probate was revoked in consequence of another executor having proved a subsequent will, and the first executor, with a knowledge of these facts, sold goods of the testator's; it was held in an action of trover by the rightful executor, that the defendant was not entitled to show, in mitigation of damages, that he had administered assets to the amount.^c

A creditor taking goods in payment from an executor *de son tort*, cannot protect himself against the rightful executor, although, if the payment be just, he shall be recouped in damages.^f

An executor *de son tort* has a sufficient title to maintain an action against a mere wrong-doer for the seizure of a chattel.^g If he hands over goods on which the deceased had a lien, it is not a conversion.^h

- *962 *An executor *de son tort* is uniformly declared against as if he were lawful executor, though the party died intestate; and he may be joined in the same action with the lawful executor, though not with the lawful administrator.ⁱ And if the hus-

* 1 Went. 333. Coulter's Case, 5 Co. 30. Cro. Eliz. 630. Curtis v. Vernon, 3 T. R. 587.

^b Oxenham v. Clapp, 2 B. & Ad. 309. (29 Eng. C. L. 84.) But if he afterwards, or even *pendente lite*, obtain administration, he may retain; for it legalises those acts which were tortious at the time. 1 Saund. 265. Yet it has been held, that a rightful administrator is not bound by an agreement made by him while he was executor *de son tort*. Doe v. Glenn, 1 Ad. & Ell. 49. (28 Eng. C. L. 33.) 3 Nev. & M. 837.

^c Bac. Ab. Exec. (B. 3.) 2. 2 Bl. Com. 508. Greysbrook v. Fox, Plow. 282. Anon. 12 Mod. 441. Wms. 144.

^d Went. 335. Toller, 365. 2 Bl. Com. 508.

^e Woolley v. Clarke, 5 B. & A. 744. (7 Eng. C. L. 249.)

^f Mountford v. Gibson, 4 East, 441. 1 Saund. 265, 5th Ed.

^g Oughton v. Seppings, 1 B. & Ad. 241. (20 Eng. C. L. 38.) See Husband v. Smith, 1 Ch. Pl. 151.

^h Samuel v. Morris, 6 C. & P. 690. (25 Eng. C. L. 565.)

ⁱ 1 Saund. 265. Com. Dig. Admin. C. 3. Toller, 369.

(1) (Acc. Glenn v. Smith, *supra*.)

(2) (Saam v. Saam, 4 Watts, 432. Glenn v. Smith, 2 Gill & Johns. 493.)

band of an executrix, after her death, detain part of the goods of a testator, he may be sued as executor *de son tort*.^a

SECTION III.

ADMINISTRATORS.

By the 31 Ed. III, s. 1, c. 11, the ordinary shall depute the next and most lawful friends of the dead person intestate to administer his goods; and the 21 Hen. VIII, c. 5, s. 3, provides, that in case any person die intestate, or that the executors named in any testament, refuse to prove it, the ordinary shall grant administration "to the widow of the deceased, or to the next of kin, or to both as by the discretion of the same ordinary shall be thought good." The same section further provides, "that where divers persons, equal in degree of kindred to the deceased, claim administration, the ordinary shall be at liberty to accept any one of them."

The husband has a right, exclusively of all others, to be the administrator of his wife,^b(1) even though the marriage be voidable, unless sentence of nullity be declared before her death;^c but he is not entitled to administration if the marriage be void, *ab initio*, as if the wife be of unsound mind.^d And in case the husband dies without taking out administration to his wife, the court will grant administration to the next of kin of the wife, and not to the representatives of the husband.^e But such administrator shall be considered in equity as trustee for the representatives of the husband.^f

*A widow has not a right to be appointed administratrix to her husband, the ordinary has his election to grant it to her or to the next of kin, or he may grant it to them both jointly;^g or he may grant it to her as to part, and to the next of kin as to part.^h If a wife be divorced *à mensa et thoro*, she forfeits her right to the administration.ⁱ *963

If a bastard, who is *nullius filius* and has no kindred, dies intestate, and without wife or child, the crown is entitled to

^a 1 Ch. Pl. 51. Cro. Eliz. 472.

^b Humfrey v. Bullin, 1 Atk. 459. Sir George Sand's Case, 3 Salk. 92. Elliott v. Gurr, 2 Phillim. 19. Watt v. Watt, 3 Ves. 244. R. v. Bettesworth, 2 Stra. 1111. 29 Car. II. c. 3.

^c Elliott v. Gurr, 2 Phillim. 19.

^d Browning v. Reane, 2 Phillim. 69.

^e Reece v. Strafford, 1 Hagg. 347, and other cases cited in Wms. 244.

^f Humfrey v. Bullin, 1 Atk. 458.

^g Anon. 1 Stra. 525.

^h Roll. Ab. tit. Exec. D. Pl. 908. Fawtry v. Fawtry, 1 Salk. 36.

ⁱ Pettifer v. James, Bunbury, 16.

(1) (See how the husband's right may be affected by the terms of the marriage settlement. Ward v. Thompson, 6 Gill and Johns. 349.)

administration, subject to the debts of the intestate.^a But the practice in such cases is, to transfer the claim of the crown by letters patent; and the ordinary grants administration to the appointee.^b If the ordinary refuses to grant administration in case of intestacy, pursuant to the directions of the statutes, the court of King's Bench, will compel him by *mandamus*.^c But where the ordinary has an election, the court will not compel him to grant administration to any particular party, so as to deprive him of the election, but they will oblige him to grant it to some party.^d

If none of the next of kin will take out administration, a creditor may by custom do it.^e

SECTION IV.

ADMINISTRATION CUM TESTAMENTO ANNEKO.

When and
to whom
adminis-
tration
*cum testa-
mento an-
nexo* will
be granted
*964

If the deceased makes a will and appoints no executor, or if through any cause an executor fails to act, as if he does not prove the will, or if after having proved it he dies intestate, without having administered the goods of the testator, the ordinary must grant an administration with the will annexed.^f In such cases as are not within the statutes, which are almost *confined to cases of intestacy,^g the court have a discretion in the choice of an administrator, and the practice is to elect such of the claimants as has the greatest interest in the effects of the deceased.^h Hence, in all cases where no executor is appointed, or when appointed fails to represent the testator, the residuary legatee, if there be one, is preferred to the next of kin, and entitled to administration with the will annexed; for he is the testator's choice, and if there be several entitled to the residue, administration may be granted to any of them.ⁱ But if the residuary legatee declines, it is usual to grant administration to the next of kin, if he has any interest.^j

^a Jones v. Goodchild, 3 P. Wms. 33. Megit v. Johnson, Doug. 548. 2 Bl. Com. 505.

^b Manning v. Knap, 1 Salk. 37.

^c R. v. Bettesworth, 2 Stra. 691. R. v. Hay, 1 Bl. 640. R. v. Horsley, 8 East, 405.

^d Anon. Stra. 522, cited in 8 East, 408. * 2 Bl. Com. 505.

^e Isted v. Stanley, Dyer, 372. Hayton v. Wolfe, Cro. Jac. 614. Day v. Chatfield, 1 Vern. 200.

^f See ante, 962.

^g Wetdrell v. Wright, 2 Phillim. 242. And see 1 Hagg. 341.

^h Atkinson v. Barnard, 2 Phillim. 318. Taylor v. Shore, T. Jones, 162. Com. Dig. Admin. (B. 6.) Thomas v. Butler, 1 Vent. 217. 2 Lev. 55. 1 Vent. 219. Wms. 286.

ⁱ West v. Willby, 3 Phillim. 381.

SECTION V.

ADMINISTRATION DE BONIS NON.

IF a sole executor die without proving the will, the executorship is not transmissible to his executor, but is wholly determined, and the ordinary must grant administration *cum testamento annexo*. If the executor dies after probate intestate, no interest is transmissible to his own administrator; but administration *de bonis non administratis* (that is, of the goods of the original testator, left unadministered) must be granted.^a (1) But if he dies *before* probate, having administered part of the personal estate of the testator, the administration shall not be *de bonis non*; but an immediate administration.^b If one of several executors dies, before or after probate, no interest is transmissible to his own executor, but the whole representation survives to his companion. Where such surviving executor dies after probate, having made a will appointing his own executor, the representation of the original testator will be transmitted to him. In every case where a sole executor or a surviving executor dies intestate after probate, an administration *de bonis non* will be granted. So upon the death of a sole administrator, or of a surviving administrator, administration *de bonis non* will be granted, whether such administrator dies testate or intestate.^c

*965

SECTION VI.

OF LIMITED ADMINISTRATIONS.

	PAGE		PAGE
1. Administration durante minore ætate.		3. Administration durante absentia.	967
2. ————— pendente lite.	966		

1.—*Administration durante minore ætate.*] BESIDES the Who may administrations already treated of, which extend to the whole be admin-

^a Bro. Ab. Admin. Pl. 7. Com. Dig. Admin. (B. 6.) 2 Bl. Com. 506.

^b Salk. 305.

^c 3 Bac. Ab. tit. Exec. (G.) 2 Bl. Com. 506. An administrator *de bonis non* will be the only representative of the original deceased party.

(1) (An administrator *de bonis non* can claim nothing but the goods of the intestate remaining in specie unconverted and unchanged at the time of the death of the original administrator. *Potts v. Smith*, 3 Rawle, 361. *Bank of Penna. v. Haldeman*, 1 Penna. R. 161. *Kendall v. Lee*, 2 Penna. 482. *Hagthorp v. Hook's Adm.*, 1 Gill & Johns. 270.)

istrator
durante
minore
etate; his
privileges
and liabil-
ities.

personal estate of the deceased, and terminate only with the life of the grantee, it is competent to the ordinary to grant *limited* administrations, which are confined to a particular extent of time, or to a specified subject matter. If an infant be appointed sole executor, or if the right of administration devolves upon him, under the statute, an administration *durante minore etate* must be appointed. Formerly an infant executor was considered capable of the office on arriving at the age of seventeen, but now by the 38 Geo. III, c. 87, s. 6, after reciting that inconveniences arose from granting probate to infants under the age of twenty-one, it is enacted, "that where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have attained the age of twenty-one years, at which period, and not before, probate of the will shall be granted to him."

An administrator *durante minore etate* may not only bring actions to recover debts due to the deceased,^a but he may also bring trover for the goods, because he has more than the bare custody of them, for he has the property itself;^b and though he has only a special property in the goods, he may do all acts *966 *which are incumbent on an executor to do, and which are for the benefit of the estate.^c He may sell goods for the payment of debts; he may assent to a legacy, and receive debts due to the deceased. He may also sue for debts, and if an action be brought against him, and the administration determine, pending such action, he may retain assets to satisfy the debt which is attached on him by the action.^d He may grant leases.^e If an administrator *durante minore etate* brings an action, he must aver in the declaration that the infant is still under age.^f But the defendant can take advantage of the omission on special demurrer only.^g If an action be brought against such administrator, the plaintiff need not aver that the infant is still under age, for it is a matter more properly within the cognisance of the defendant.^h

If an executor *durante minore etate* has duly administered the assets, and paid over the surplus to the executor of full age, he may show this matter in an action by a creditor, under a plea of *plene administravit*.ⁱ But if he has committed *devastavit* he will be liable to creditors, even though he should obtain a release from the infant when of full age.^j He cannot,

^a Com. Dig. Admin. (F.) Piggot's Case, 5 Co. 29, a.

^b Com. Dig. *id.* Sethe v. Sethe, Roll. Ab. Ex. (F.) Williams, 305.

^c Bac. Ab. Ex. (B. 1.)

^d *Id.* Com. Dig. Admin. (F.) Prince's Case, 5 Co. 29. Sparks v. Crofts, Comb. 465. Roskelly v. Godolphin, T. Raym. 483.

^e Bac. Ab. Leases, (I, 7.) Wms. 305-6.

^f Piggot's Case, 5 Co. 29, a. Walthal v. Aldrich, Cro. Jac. 590.

^g Bac. Ab. Ex. (B. 1.)

^h Beal v. Simpson, 1 Lord Raym. 409. Carver v. Haslrig, Hob. 251.

ⁱ Anon. Freem. 150. Wms. 308.

^j B. N. P. 145. Lawson v. Crofts, 1 Sid. 57.

however, be charged for waste, as executor *de son tort*, after the infant has attained twenty-one, for he had authority to administer.*

An administrator *durante minore ætate* of the executor of an executor is the representative of the first testator; and in an action by the creditor of the original testator, such an administrator is properly charged as the administrator of the second executor, and not as the administrator *de bonis non* of the original testator.†

2.—*Administrator pendente lite.*] When a suit is commenced *in the ecclesiastical court concerning an executorship, or the right of administration to an intestate, the ordinary may appoint an administrator *pendente lite*, who is merely an officer of the court, and holds the property only until the suit terminates. Such an administrator may maintain actions for the recovery of debts due to the deceased,‡ but his authority is confined to the collection of effects, he cannot vest or distribute them,§ and when the suit is terminated, he must pay over all he has received in the character of administrator, to the person pronounced by the court to be entitled.¶(1)

3.—*Administrator durante absentia.*] If the executor named in the will or the next of kin be out of the kingdom, the ecclesiastical courts may, before probate is obtained or letters of administration taken out, grant to another administration during his absence, but it must be an absence out of the realm to justify such an appointment.‡ But when probate was once granted, and the executor had gone abroad, the courts did not feel themselves authorised to grant new administration on the ground that the executor had left the kingdom; a defect in the authority of the court which was productive of much inconvenience; to remedy which the statute 38 Geo. III, c. 87, after reciting the inconvenience, enacted, “that if at the expiration of twelve calendar months from the death of any testator, the executor to whom probate is granted shall not reside within the jurisdiction of the courts, a creditor or next of kin may obtain a special administration for the purpose of being made a party to a bill in equity to be exhibited against him, and to carry the decree into effect, and no further.” By sec. 4, the court of equity may appoint persons to collect outstanding debts.

* Palmer v. Litherland, Latch. 160.

† Anon. Freem. 288. Norton v. Molyneux, Hob. 246.

‡ Walker v. Woollaston, 2 P. Wms. 576. 2 Stra. 914. Knight v. Duplessis, 1 Ves. Sen. 325. Ball v. Oliver, 2 Ves. & B. 97.

§ Gallican v. Evans, 1 Ball & Beaty, 193. Adair v. Shaw, 1 Scho. & Lef. 254.

¶ Id. 255. In the goods of Graves, 1 Hagg. 313.

‡ Clare v. Hodges, 1 Lutw. 342. Slater v. May, 2 Lord Raym. 1071. 2 Salk. 12.

(1) (Com. v. Mateer, 16 Serg. & R. 416. Ellmaker's Estate, 4 Watts, 34.)

- *968 It has been decided that the provisions of this act apply only to cases where there are proceedings in Chancery, in all other cases the spiritual court can only grant administration *durante absentia*, on the ground that there is no legal representative.^a When an administrator has been appointed under the statute, if the executor dies, to whom the probate had been granted, the administration, notwithstanding, continues until the appointment of a new representative.^b In an action by a person to whom administration *durante absentia* is granted, the declaration must aver the absence of the executor beyond the seas at the time that the administration was granted, and that his absence continued.^c

SECTION VII.

OF BONA NOTABILIA.

Of probate
or admin-
istration
where
there are
*bona nota-
bilia*.

- In general, the will of the testator is to be proved before the ordinary of the diocese in which he resided, and if all his goods and chattels be within the same jurisdiction, a probate before the ordinary, or an administration granted by him, are the only proper ones.^d But if the deceased at the time of his death had *bona notabilia* to the amount of five pounds within some other diocese or peculiar than that in which he died, then the will must be proved before the metropolitan of the province by way of special prerogative, whence the courts where the validity of such wills is tried, and the offices where they are registered are called the Prerogative Courts, and the Prerogative offices of Canterbury and York.^e Where there are *bona notabilia* in one diocese of Canterbury and one of York, the bishop of each diocese must grant an administration. Where, in two dioceses
- *969 ^fof each province, there must be two prerogative administrations.^f

Where a canal was situated in the provinces of Canterbury and York, but the office for transacting the business of the canal was in the former province, it was held sufficient to prove

^a In the goods of Davies, 2 Hagg. 79. Wms. 319.

^b Taynton v. Hannay, 3 B. & P. 26.

^c Slater v. May, 2 Lord Raym. 1071.

^d 2 Bl. Com. 508.

^e A peculiar is a district exempt from the jurisdiction of the ordinary of the diocese in which it lies; and it is called a peculiar because it is excluded from the common ordinary, and under a peculiar and special ordinary of its own. 2 Gibs. Cod. 978. Denham v. Stephenson, 1 Salk. 41. Parham v. Templer, 3 Phillim. 245. And such special ordinary is empowered to grant probate and administration in respect of the goods of those who die within them leaving no *bona notabilia* out of their limits. See further on this subject, Wms. 166, n.

^f 2 Bl. Com. 508.

^g Burston v. Ridley, Salk. 39.

the will of a shareholder in the Prerogative Court of Canterbury.^a

If a man die *in itinere*, the goods which he has about him at that time shall not cause administration to be taken out in the prerogative court; but if he die not *in itinere* in a diocese in which he has no goods, but having *bona notabilia* in another diocese, it will be sufficient to authorise the archbishop to grant probate.^b To give jurisdiction to the prerogative court, it is not necessary that the deceased should have goods to the amount of five pounds in each of the several dioceses where his goods are dispersed; it is sufficient if he were possessed of goods in some other diocese or dioceses or jurisdictions, altogether amounting to the value of five pounds, besides those in the diocese wherein he died.^c Where one dies possessed of *bona notabilia* in a diocese, and also in a peculiar within that diocese, or in several peculiars within the same diocese, probate shall not be granted by the bishop of the diocese, but by the metropolitan, inasmuch as they are exempt from ordinary jurisdiction.^d But where one dies possessed of *bona notabilia* in the diocese of an archbishop and in a peculiar within the same diocese, there must be two probates or letters of administration, one within the peculiar, and the other by the archbishop as ordinary of the diocese.^e

If the ordinary grants probate or letters of administration where the deceased had *bona notabilia* in different dioceses in the same province, they are absolutely void; but if the archbishop grants probate or letters of administration where the deceased had not *bona notabilia* in diverse dioceses, they are not void but voidable only.^f So, if there be *bona notabilia* in a peculiar, and also in other parts of the diocese, a metropolitan administration is not void, and it is doubtful whether it is even voidable.^g Where administration is granted in a wrong diocese it is void, but where granted to a wrong person it is voidable only.^h Where a diocesan probate is void, under the circumstances above stated, it may be pleaded in bar to an action by such executor or administrator, "that there were *bona notabilia* in diverse dioceses," or the defendant may give that matter in evidence upon a plea of *ne unques executor*, &c., for it confesses and avoids, and does not falsify the seal of the ordinary.ⁱ But if the defence be that the contract which

Effect of taking out probate or administration in a wrong diocese where there are *bona notabilia*.
*970

^a Smith v. Stafford, 2 Wils. C. C. 166.

^b 1 Roll. Ab. 209, tit. Ex.

^c Swinb. pt. 6, s. 11, Pl. 5.

^d Anon. 1 Lev. 78. Gibs. Cod. 472. Parham v. Templer, 3 Phillim. 247.

^e 1 Gib. Cod. 472. Price v. Simpson, Cro. Eliz. 719. But see Lysons v. Barrow, 2 Bing. N. C. 486, (29 Eng. C. L. 402,) post, 970.

^f R. v. Loggen, 1 Stra. 75. Blackborough v. Davis, 1 P. Wms. 43. Needham's Case, 8 Co. 135. Prince's Case, 5 Co. 30. Swinb. pt. 6, s. 4. Wms. 181.

^g Lysons v. Barrow, 2 Bing. N. C. 486. (29 Eng. C. L. 402.) 1 Hodges, 390. See Parham v. Templer, 3 Phillimore, 245. Price v. Simpson, Cro. Eliz. 919.

^h B. N. P. 141. S. N. P. 767, n.

ⁱ 1 Saund. 275, a.

^j Id. B. N. P. 143. Noel v. Wells, 1 Lev. 236.

is the subject of the action did not pass under the grant by reason of the defendant's residence out of the diocese at the time of the death of the testator, that fact must be specially pleaded.^a

Commissaries.

It may be observed that the rule, which applies to bishops with respect to each other, does not affect the several commissaries of the same bishop among themselves. Their probate in the court of the archdeacon of *Sudbury*, to whom the bishop granted full power to prove the wills of all persons deceased within the archdeaconry, was held good, the testator having died within the said archdeaconry, although he was possessed of a term of years in lands lying within another archdeaconry in the same diocese; for the appointment of the bishop, as it regarded the power of the commissary to prove wills, armed him with episcopal authority for that purpose. The grant of the power attracted to it all the means by which the power could be exercised. The commissary was bishop for the purpose of proving such wills as he was authorised by the grant to prove.^b

*971
What are
bona notabilia.

*A lease for years of the value of five pounds shall be deemed *bona notabilia* where the land lies and not where the lease is.^c So, an annuity for years out of a parsonage shall be deemed *bona notabilia* where the parsonage is.^d Where a canal was situate in both provinces, but the office for transacting the business of it was in that of Canterbury, the court held that the probate of the will of a shareholder in the province of Canterbury was sufficient, and that a probate in York was unnecessary;^e and where by a canal act shares were to be deemed *personal property*, and the canal passed partly through the diocese of Worcester and partly through that of Lichfield and Coventry, the transfers of shares were filed at the office of the company in the latter diocese, where the dividends were also paid and books of account kept; it was held, that for the purposes of probate, the right of a shareholder might be considered as locally situated in the diocese of Lichfield and Coventry, and that a probate granted by the ordinary of that diocese was sufficient.^f

Debts owing to the testator are considered *bona notabilia* as well as goods in possession.^g Debts by specialty are *bona notabilia*, not at the place where the testator or intestate dies, but at the place where the securities are at the period of his death.^h Judgments, statutes or recognisances are *bona notabilia* at the place where they are acknowledged or record-

^a *Stokes v. Bate*, 5 B. & C. 491. (11 Eng. C. L. 289.)

^b *R. v. Yonge*, 5 M. & S. 119.

^c Com. Dig. Admin. (B. 4.)

^d *Dyer*, 305, a. in margin.

^e *Smith v. Stafford*, 2 Wils. 166.

^f *Ex parte Home*, 7 B. & C. 632. (14 Eng. C. L. 106.)

^g Com. Dig. Admin. (B. 4.) Swinb. pt. 6, s. 11.

^h *Lunn v. Dodson*, 1 Roll. Ab. 908. *Byron v. Byron*, Cro. Eliz. 472. 1 Saund.

ed.* But simple contract debts, such as bills of exchange, are *bona notabilia* in that diocese where the *debtor* resides at the time of the creditor's death.^{b(1)}

*SECTION VIII.

*972

OF THE INTEREST WHICH AN EXECUTOR OR ADMINISTRATOR TAKES IN THE ESTATE OF THE DECEASED.

As the executor derives all his interest from the will itself, The property of the deceased vests in him from the moment of perty

* *Adams v. Savage*, Lord Raym. 855. 1 Saund. 275, n. 3 *Dyer*, 305, a. in margin. *Cogg v. Horton*, 1 Lutw. 401. *Carlisle v. Greenwood*, 7 Mod. 15. *Dyer*, 305, in margin. 1 Roll. Ab. Ex. H. Pl. 4. *Shaw v. Storton*, Freem. 102. *Yeomans v. Bradshaw*, Carth. 373. *Griffith v. Griffith*, Say, 83.

(1) (Letters testamentary or of administration in general have no extraterritorial operation, and therefore where granted in one of the United States give no authority to sue or administer assets in another. *Glenn v. Smith*, 2 Gill & Johns. 493. The foreign executor or administrator cannot indorse a note so as to give the indorsee a right to sue in his own name. *Stearns v. Burnham*, 5 Greenl. 261. Yet where the cause of action has accrued to the foreign executor or administrator after the decease of his testator or intestate, and where he need not sue in his representative character, his action may be maintained. *Barrett v. Barrett*, 8 Greenleaf, 346. *Robinson v. Crandall*, 9 Wend. 425.

It has been held in Pennsylvania that an administrator is not chargeable with assets in another state. *Methland v. Wiremen*, 3 Penn. R. 185. See *Miller's Estate*, 3 Rawls 319. Yet in New York he is bound by the decisions to have ancillary administration taken out in the other state, and the assets there collected and administered. *Shultz v. Palou*, 11 Wend. 361. 3 Paige, 182.

The administration granted in the place where the deceased had his domicile is the principal administration. That, in any other state, is ancillary or subordinato. Funds are usually collected, and transmitted to the principal administrator for distribution. It is not necessary, however that this should be done, as the courts in the country where the property is situated, having jurisdiction over the same, may make the distribution themselves, having regard to the laws of the country where the deceased was domiciled. If debts are due and owing in the country where the subordinato administration is taken out, they will not transmit the funds, or make distribution until those debts are paid; but they will first see that justice is done to their own citizens, and then either remit or distribute, as circumstances may require. In the case of an insolvent estate, justice requires that all creditors should be treated alike, and not that the creditors in one state should receive the whole amount of their demands, and the creditors in another only a partial dividend. It seems, that where the ancillary administration is solvent, and the principal insolvent, the surplus ought to be transmitted: but that the creditors in the state of the ancillary administration will be allowed to exhaust the funds without reference to their proportions with the others. *Fry v. Hunt*, 7 Vermont, 170. See some American authorities collected in 2 Wheaton's Selwyn's N. P. (Ed. of 1831,) p. 4 and note A, to which add *Brodie v. Bickley*, 2 Rawls, 431. *Jenison v. Haggood*, 10 Pick. 77. *Hunter v. Bryson*, 5 Gill & Johns. 483.

Upon the *Conflict of Laws* generally the student is referred to the late admirable treatise of Judge Story, which has already become a book of reference and authority in Westminster Hall. He cannot fail however to arise from its perusal with a feeling sense of the unsettled state of the law upon this subject, so peculiarly interesting in this country. I think it much to be lamented that questions of this nature have not been referred in some way to the ultimate decision of a superior tribunal, which might speak with the voice of authority to the whole Union, such as the Supreme Court of the United States.)

vests in an executor on the death of the testator, but not in an administrator until administration is granted.

the testator's death.^a Thus, where the demise by an executor, the lessor of the plaintiff in ejectment, was laid two years before he had proved the will under which he claimed, it was held good.^b But as an administrator derives his title from the ecclesiastical court, the property of the deceased does not vest in him until letters of administration are granted, nor does any right of action accrue to him before that period. Therefore where *A.* took out letters of administration under a will by which he was appointed executor, and after notice of a subsequent will sold the goods of the testator; it was held, that the rightful executor, in an action of trover, was entitled to recover the full value of the goods sold, and that *A.* was not entitled to show, in mitigation of damages, that he had administered assets to that amount.^c The executor before probate may do almost all acts which are incident to his office. He may take possession of the testator's goods and dispose of them at his discretion; he may pay legacies, and assent to a legacy, and such assent is good though he die before probate.^d If an executor releases before probate, such act will bind him after he has proved the will.^e But if a man releases and afterwards takes out letters of administration, it will not bar him for the right was not in him at the time of the release.^f

An executor cannot maintain an action before probate.

*973

But he cannot maintain an action before probate, except where he has *actually* been in possession of the property which is the subject of the action; when he sues as executor, he must make profert of the letters testamentary, otherwise the defendant may demur,^g and though, where goods be taken or converted after the testator's death, the executor may declare on his own *constructive* possession, (since the property in the goods draws to it a possession in law,^h) notwithstanding he has never had actual possession, without naming himself executor or making profert, still on the general issue he must show his own title as executor at the trial by producing the probate in order to prove his constructive possession.ⁱ In trover for a horse and gig, claimed by the plaintiff as vendee, of an executor; the court held, that as it appeared that the executor never had a clear undisputed possession, it was necessary to produce the probate to prove his title under the will, and that the will

^a *Smith v. Willes*, 1 T. R. 480. *Wolley v. Clark*, 5 B. & A. 744. (7 Eng. C. L. 249.) *Graysbrook v. Fox*, Plow. 281.

^b *Roe v. Summerson*, 2 Bl. 692.

^c *Woolley v. Clark*, 5 B. & A. 745-6. (7 Eng. C. L. 249.) *Murray v. E. I. Co.* 5 B. & A. 204. (7 Eng. C. L. 66.) *Pratt v. Swayne*, 8 B. & C. 285. (15 Eng. C. L. 219.)

^d *Wankford v. Wankford*, 1 Salk. 301. *Humfrey v. Ingledon*, 1 P. Wms. 753. *Wills v. Rich*, 2 Atk. 285.

^e *Id.*

^f *Barefoot v. Barefoot*, Palm. 411. *Harrison's Case*, 5 Co. 28, b.

^g *Comber's case*, 1 P. Wms. 760.

^h 2 Saund. 47.

ⁱ *Hunt v. Stevens*, 3 Taunt. 113.

itself without the probate, was not sufficient evidence of his title.^a

But though an executor cannot maintain an action before probate, except upon his own actual possession, yet he may commence an action, and arrest a debtor to the estate of the testator,^b and if he obtains probate before he declares, he may proceed with the action previously commenced.^c An executor can take out a commission of bankrupt before probate;^d and on the other hand, if he administers the goods of the testator, he is liable to be sued at law or in equity, by the creditors of the deceased.^e

It may be here observed, that though an administrator derives his right from the letters of administration, yet, for some purposes his interest relates back to the death of the intestate; thus he may have an action of trespass or trover for the goods of the intestate, taken by one before the letters be granted to him.^f(1) So he may bring actions in respect of matters affecting leasehold, subsequent to the death of the intestate, and he will be liable to account for the rents and profits *from that period;^g and in ejectment by an administrator, the demise may be laid on a day after the intestate's death but before administration granted.^h

*974

Executors and administrators so entirely represent the personal estate of the deceased, that they are liable to the payment of all his debts, covenants, &c., to the extent of the assets which come into their hands; but where no default is in them, their liability on account of the deceased does not exceed the amount of the assets.ⁱ(2) Each executor and administrator has the entire control of the personal estate of the deceased, and may dispose of such property, and release and pay debts without the concurrence of his co-executor or administrator.^j(3)

Their liability on account of the deceased.

^a Pinney v. Pinney, 8 B. & C. 335. (15 Eng. C. L. 230.)

^b Martin v. Fuller, Comb. 171. Wankford v. Wankford, 1 Salk. 302. Duncomb v. Walter, Skin. 87.

^c Wills v. Rich, 2 Atk. 285.

^d Ex parte Paddy, 3 Madd. 241. Rogers v. James, 7 Taunt. 147. (2 Eng. C. L. 52.)

^e Wentworth, 86. Plowd. 280.

^f Anon. Comb. 451. 2 Roll. Ab. 399, tit. Relation, (A.)

^g R. v. Horsley, 8 East, 410.

^h S. N. P. 708, ante, 882.

ⁱ Went. Off. Ex. c. 12. 1 Inst. 209, a. S. N. P. 770.

^j Id. 771. 2 Ves. 267. Pannell v. Fenn, 1 Roll. Ab. 924. Dyer, 23, b, in margin.

(1) (And need not declare in his representative character. *Valentine v. Jackson*, 9 Wend. 302.)

(2) (It is true in regard to executors who give no bonds, and to trustees, that each is liable only to the amount which came to his hands. But on a joint administration, the administrators are responsible for each other. If an administrator wishes he may protect himself from such liability, by entering into a separate bond. *Boyd v. Boyd*, 1 Watts, 365. A joint receipt is *prima facie* evidence only against each of the signers or co-executors, that he received the money; and if he wishes to avoid the consequent liability, it will lie upon him to prove that it was not received by him. *McNeir's Appeal*, 4 Rawle, 157. When one executor has money actually in his hands and pays it over to the other, he is generally liable. Per Huston, J., in *Sterrett's Appeal*, 2 Penna. R. 422. See *Peter v. Beverly*, 10 Peters, 532.)

(3) (One of two administrators may submit a matter in dispute between himself in right of

They are merely trustees of the property.

But the interest which they have in the property of the deceased, is not absolute, as in the case of their own proper goods; they have their estate as such, *in autre droit*, merely under trust to apply it for the payment of his debts, and other legitimate purposes.^a Therefore, if the executor becomes bankrupt the goods of the testator, if distinguishable from the rest of the executor's property, do not pass under the commission.^b But where a person entitled to take out administration neglected to do so, and having remained in possession of the goods for twelve years, became a bankrupt; it was held, that the goods passed to the assignees as property in the possession, order and disposition of the bankrupt, with the consent of the true owner.^c

It has been held, that the goods of a testator in the hands of his executor, cannot be seized under an execution against the executor in his own right.^d But where an executrix used the goods of her testator as her own, and having married, treated them as the property of her husband; it was held, that it was not *competent to her to object to the goods being taken in execution for her husband's debts.^e

As no man can bequeath any property but what he has to his own use, an executor cannot bequeath the goods of his testator to a legatee;^f yet, generally speaking, he may in his lifetime dispose of and alien the assets of the testator, and the creditors of the latter cannot follow them,^g unless there be collusion between the executor and the transferee.^h

By 1 Wm. IV, c. 40, where any person shall die after 1st of September, 1830, having by his will, or any codicil thereto, appointed executors, such executors shall be deemed by courts of equity to be trustees for the persons (if any) who would be entitled to the estate under the statute of distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will, or any codicil thereto, that the executors were intended to take such residue beneficially.

By sec. 2, it is not to affect the rights of executors where there is not any person entitled to the residue by the statute of distributions.

^a Pinchon's case, 9 Co. 88, b. 2 Inst. 236. Per Ashhurst, J., in *Farr v. Newman*, 4 T. R. 645.

^b *Ludlow v. Browning*, 11 Mod. 138. *Viner v. Cadell*, 3 Esp. 88. Per Lord Mansfield, in *Howard v. Jemmett*, 3 Burr. 1369.

^c *Fox v. Fisher*, 3 B. & A. 135. (5 Eng. C. L. 243.)

^d *Farr v. Newman*, 4 T. R. 621, (Buller, J., *dissentiente*,) recognised by Lord Eldon, in *M'Leod v. Drummond*, 17 Ves. 168.

^e *Quick v. Staines*, 1 B. & P. 293. ^f *Bransby v. Grantham*, 2 Plowd. 595.

^g Per Lord Mansfield, in *Whale v. Booth*, 4 T. R. 625. The principle is that the executor or administrator in many instances *must* sell in order to perform his duty in paying debts, &c., and no one would deal with him if liable afterwards to be called to an account. *Id.*

^h *M'Leod v. Drummond*, 17 Ves. 147. 353.

his intestate and another to reference, and the award will bind the estate. *Grace v. Sutton*, 5 Watts, 540.)

SECTION IX.

OF THE DISPOSITION OF THE ESTATE OF THE DECEASED.

	PAGE		PAGE
1. Payment of funeral expenses.		debts.	981
2. Of the order in which debts should be paid.	977	4. Power of executor to give a preference among creditors of equal degree.	983
3. Of the consequences of not observing the rule of priority in the payment of		5. Power of executor to retain for his own debt.	983

1.—*Payment of funeral expenses.*] It is the duty of the executor to bury the deceased in a manner suitable to the estate which he leaves behind him;^a necessary funeral expenses are allowed *previous to all other debts and charges; but if the executor or administrator be extravagant, it will be deemed a devastavit or waste of the goods of the deceased, not only as against creditors, but even as it respects legatees or next of kin in distribution. In strictness, no funeral expenses are allowed in the case of an insolvent estate, except for the coffin, ringing the bell, and the fees of the parson, clerk, and bearers, but not for the pall or ornaments;^b and where 150*l.* were charged for the funeral of a testator who was in debt, the court refused to allow more than 10*l.*;^c but in another case, where 60*l.* were charged, Lord Hardwicke said, “at law, where a person dies insolvent, the rule is, that no more shall be allowed for funeral expenses than is necessary: at first, 40*s.*, then 5*l.*, and at last 10*l.*,” “but,” said he, “the court is not bound down by such strict rules, especially when a testator leaves great sums in legacies, (as in this case,) which is a reasonable ground for the executor to believe that the estate is solvent; and as the testator directed his corpse to be buried at a church thirty miles from the place of his death, I am of opinion that 60*l.* is not too much for the funeral expenses.”^d(1)

Allow-
ance for
funeral ex-
penses
where the
estate of
the de-
ceased is
insolvent.
*976

In Buller's *Nisi Prius*, it is said that the usual method is to allow 5*l.*^e Where the deceased was a small tradesman, 10*l.*

^a 2 Bl. Com. 508.

^b *Id.* Stackpole v. Stackpole, 4 Dowl. 237.

^c Per Holt, C. J., in Shelly's Case, Salk. 296. The rule as against a creditor is, that no more shall be allowed for a funeral than is necessary. Per Bayley, J., 1 B. & Ad. 264. (20 Eng. C. L. 383.)

^d *Anon.* Comber. 349.

^e Stag v. Printer, 3 Atk. 119.

^f B. N. P. 143. See also Smith v. Davies, S. N. P. 780.

(1) (Administrators are entitled to a moderate allowance for money expended in procuring mourning for the widow and children of the deceased, although the estate is insolvent. *Wood's Estate*, 1 Ashmead, 314. But it is a *devastavit*, if the administrator gives any of the personal estate to support the widow and children, at least, after he knows the estate to be insolvent. *Billington's Appeal*, 3 Rawle, 48. The estate of a testator is not liable for the funeral expenses of his widow. *Lowell v. Kresidler*, 3 Rawle, 300.)

was held to be a reasonable allowance to the executrix for funeral expenses, as against a creditor.^a But in a late case, where 79*l.* were expended on the funeral of a person who had been a captain in the army, and who at the time of his death was on half pay, and it appeared that assets to the amount of 129*l.* had come into the hands of the executrix; on an issue taken on a plea of *plene administravit*, the court held, that 79*l.* was a larger sum than ought to be allowed as against a creditor. "The rule," said Mr. Justice Bayley, "as against a creditor is, that no more shall be allowed for a funeral than is necessary.

*977 *In considering what is necessary, regard must undoubtedly be had to the degree and condition in life of the party." His lordship said that 10*l.*, (the sum mentioned by Lord Hardwicke) was at the present day less than what reasonably should be allowed; and intimated that 20*l.* was a proper allowance for the funeral under the circumstances.^b

Where an expensive funeral had been sanctioned by a party who subsequently took out letters of administration to the effects of the deceased; held, that he was liable in the capacity of administrator, for the expense.^c

Where 600*l.* had been expended on the funeral of a man of *great estate* and reputation in his county, the court allowed that sum as a debt to affect the trust estate.^d A payment of 93*l.* 12*s.* 6*d.* for mourning rings, distributed among the relations and friends of the deceased, was allowed by Lord Eldon to the executor, though the will gave no directions on the subject, but left it to the discretion of the executors.^e But in a recent case, it was held that a demand for mourning furnished to the widow and family of the testator, was not such a funeral expense as could be claimed against the estate by the executor who gave the order for it, and consequently that a legatee who had not received his legacy, was a competent witness for the executor in an action brought against him for the recovery of such demand.^f

Mourning
for the family
not allowable.

2.—*Of the order in which debts should be paid.*] The funeral expenses are to be allowed out of the estate of the deceased before any other claims whatsoever, next to which the expenses of proving the will or taking out administration are to be allowed,^g including the costs of a suit in equity, which are considered as expenses in administering the estate.^h Then he must pay the debts of the deceased, and in doing so, he should be careful to observe the rules of priority, for if he pays those of

^a *Reeves v. Ward*, 2 Bing. N. C. 235. (29 Eng. C. L. 316.) 1 Hodges, 300.

^b *Hancock v. Podmore*, 1 B. & Ad. 260. (20 Eng. C. L. 382.) And see *Edward v. Edwards*, 2 C. & M. 612. 4 Tyr. 438.

^c *Offley v. Offley*, Prac. Chanc. 261

^d *Lucy v. Waldron*, 3 Bing. N. C. 841. (32 Eng. C. L.)

^e *Paice v. The Archbishop of Canterbury*, 14 Ves. 364.

^f *Johnson v. Baker*, 2 Carr. & P. 207. (12 Eng. C. L. 92.)

^g 2 Bl. Com. 511.

^h *Loomes v. Stothard*, 1 Sim. & Stu. 461.

a lower degree, first, on a deficiency of assets, he must answer for those of a higher degree, out of his own estate.^a

Debts due to the crown by record or specialty, claim precedence *of all other debts; but debts due to the king, not by specialty, or which are not of record, are not to be preferred to debts due to the subject by specialty; such as money owing to the crown for the sale of minerals, money arising from the sale of estrays within the manors or liberties of the crown, arrears of rent due to the crown.^b

Crown debts.
*978

Next are debts which are entitled to a preference by certain statutes; such are debts for letters not exceeding 5*l.*, due to the post office;^c debts due from an overseer of the poor by virtue of his office;^d money, effects, or securities belonging to a friendly society, remaining in the hands of any of its officers at the time of his death.^e But money lent to an officer, or supposed to remain in his hands upon giving security, has been held not to be entitled to preference, which is given only in respect of money which got into the hands of officers independent of contract.^f

Debts entitled to a preference by statute.

Next in order of priority are debts of record, as judgments in courts of record, recognisances and statutes; and the privilege is not confined to the courts of Westminster, but extends to the judgments of all other courts of record having power by charter to hold plea of debt above 40*s.*^g But a judgment by a foreign attachment in the lord mayor's court is not entitled to that privilege.^h

Judgment debts.

The 4 & 5 W. & M. c. 20, s. 3, enacts, "that no judgment not docketed and entered in the books kept for that purpose, according to that act, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in the administration of the effects of the deceased." It has been held, that a judgment not docketed pursuant to the provisions of this statute, is to be considered only as simple contract debt in the administration of the estates of the deceased;ⁱ and if an heir or an executor *should plead to an action on a bond or simple contract, an outstanding judgment, the plaintiff may reply that it was not docketed according to the provisions of this statute.^j This statute is in its terms confined to the courts of Westminster; a judgment against the executor or administrator himself is not to be considered of an equal degree with those which are recovered against the deceased.^k A creditor who has obtained a judg-

Judgments not docketed, rank as simple contract debts.

*979

^a 2 Bl. Com. 511.

^b Com. Dig. Admin. C. 2. Bac. Ab. tit. Exec. (L. 2.) Went. 263. Erby v. Erby, 1 Salk. 80.

^c Stat. 9 Anne, c. 10. s. 30. 2 Bl. Com. 511.

^d 17 G. II, c. 38, s. 3.

^e 33 G. III, c. 54, s. 10.

^f *Ex parte* Stamford Society, 15 Ves. 280.

^g Went. Off. Ex. 271.

^h Holt v. Murray, 1 Sim. 485.

ⁱ Hickey v. Hayter, 6 T. R. 384. Landon v. Ferguson, 2 Russ. 349.

^j Steel v. Rorke. 1 B. & P. 307. 2 Saund. 9.

^k Went. Off. Ex. 270.

ment against the executor, has no priority except with regard to debts of equal degree with that upon which he has obtained judgment.^a Therefore, the executor may plead in bar to an action by a simple contract creditor, that there is a judgment unsatisfied which another simple contract creditor has obtained against the executor, and that it will exhaust the assets to satisfy that judgment; but such a plea is not allowable in an action by a creditor of a superior degree, as upon a bond of which the executor had notice, or a judgment which has been docketed.^b If a judgment be satisfied, and is only kept on foot to wrong other creditors; or if there be a defeasance of the judgment yet in force, then the judgment will not avail to keep off other creditors from their debts.^c Between one judgment and another, precedence or priority of time is not material; he who first sueth the executor shall be preferred; and before execution sued, the executor may pay whom he will first.^d A judgment against the testator, on a debt by simple contract, is of the same nature as a judgment on a specialty.^e

A judgment in a foreign court is considered as a debt by simple contract;⁽¹⁾ but a decree in a court of equity is equal to a judgment in a court of law.^f

Recognisances and statutes.

*980

Recognisances and statutes rank next after judgments and decrees. A recognisance is an obligation of record, entered into before a court of record or a magistrate, to do a particular act, *such as to keep the peace, appear at the assizes, pay a debt, &c. A recognisance is not of record until it is enrolled,^h and will not be entitled to precedence over specialty debts, before enrolment.ⁱ The *statutes* are, statute merchant and statute staple.

Specialty debts.

Debts by specialty, as bonds, covenants and other instruments under seal, rank next in precedence in the order of payment. Debt for rent, whether reserved by lease in writing, or by parol ranks in the same degree as a debt by specialty;^j nor is the nature of the debt changed by the determination of the lease; for the contract remains in the realty, though the right of distress be gone.^k

If the deceased was bound in a joint and *several* obligation, his executor or administrator may pay it out of the estate,

^a *Ashley v. Pocock*, 3 Atk. 308.

^b *Wms.* 659.

^c *Id.*

^e *Went. Off. Ex.* 268.

^f *Toller*, 264.

^g *Dupleix v. De Roven*, 2 Ves. 540. *Walker v. Witter*, Doug. 1.

^h *Shafte v. Powel*, 3 Lev. 355. *Astley v. Powis*, 1 Ves. Sen. 496. 3 P. *Wms.* 401, n. (P.) *Peploe v. Swinburn*, Bunb. 48.

ⁱ 2 Bl. Com. 341.

^j *Glynn v. Thorpe*, 1 B. & A. 158.

^k *Bothomly v. Fairfax*, 1 P. *Wms.* 334.

^l *Thompson v. Thompson*, 9 Price, 471. *Phillips v. Lee*, Freem. 262. Com. Dig. Admin. (C. 2.) *Gage v. Acton*, Lord Raym. 515. *Carth.* 511. 1 Salk. 325.

^m *Newport v. Godfrey*, 3 Lev. 256.

(1) (This rule has been decided to hold good between the different States of the Union. *Brengle v. McClellan*, 7 Gill & Johns. 434.)

and plead the payment to other actions on debts of equal degree, or its being outstanding to actions on simple contracts.^a But if he be bound in a *joint* obligation only, it is otherwise; for his representatives are not liable to pay it, the obligation devolving on the surviving obligor.^b Voluntary bonds shall be postponed to simple contract debts *bond fide* contracted, but preferred to legacies.^c If an executor or administrator pay a bond tainted with usury, or a bond *ex turpi causa*, it will be considered a devastavit, not only as against creditors, but as against legatees.^d A debt by bond takes precedence of debts by simple contract, though the bond be not yet due; for the obligation is the present duty, and the condition is but a defeasance of it.^e So that the executor may plead to an action on a "simple contract by his testator, that the testator entered into a bond payable at a future day, and it shall cover assets to the amount of the sum payable by the condition.^f But there is a distinction between a bond not due, and one that is due. By discharging a bond not forfeited, the penalty is saved, and assets can be covered only to the amount mentioned in the condition; but in case of a bond forfeited, the penalty is the legal debt, and assets may be covered to that amount.^g

*981

The last in order of payment are debts on simple contract, as bills of exchange, &c., and of this nature debts due to the king shall have precedence to debts due to subjects,^h next to which, debts due to servants should be paid.ⁱ⁽¹⁾ Simple contract debts.

3.—*Of the consequence of not observing the rules of priority in the payment of debts.*] Having thus stated the priority in degree of the different claims on the estate of the deceased, it may be observed, that if an executor or administrator voluntarily pays an inferior debt before a superior debt, *of the existence of which he had notice*, on a deficiency of assets, he must answer for the superior debt out of his own estate;^j and he is bound to plead a debt of a higher nature in bar of an action for a debt of an inferior nature, and *riens ultra*, if he has not assets for both, otherwise it will be an admission of assets to satisfy both debts.^k And to an action by a specialty creditor,

^a Enys v. Donnithorne, 2 Burr. 1190. Rogers v. Danvers, 1 Freem. 128.

^b *Id.*

^c Lechmere v. Carlisle, 3 P. Wms. 222. Jones v. Powel, 1 Eq. Cas. Ab. 84. Cray v. Rooke, Cas. temp. Talbot. 156.

^d Winchcombe v. The Bishop of Winchester, Hob. 167. 1 Brownl. 33. Robinson v. Gee, 1 Ves. Sen. 254.

^e Lemun v. Fooke, 3 Lev. 57. Woodshaw v. Fulmerstone, 1 Leon. 187.

^f Bank of England v. Morrice, Stra. 1028. S. N. P. 783.

^g 3 Bac. Ab. tit. Executors, (L. 2.)

^h 2 Bl. Com. 511.

ⁱ *Id.*

^j Rock v. Leighton, 1 Salk. 310. Britton v. Bathurst, 3 Lev. 114. 1 Saund. 333, a.

(1) (Where an estate is insolvent, all the dispositions of the will are superseded; and the liabilities and rights, both of the creditors and executors, are to be ascertained by the general rules of law. *Guien's Estate*, 1 Ashmead, 317. *State of Maryland v. Bank of Maryland*, 6 Gill & Johns. 205.)

he may plead judgment recovered against him on a simple contract debt, *without notice* of the specialty debt, and *riens ultra*.^a But unless he pleads to such an action, *want of notice*, he will be bound, however insufficient the assets may be, to satisfy both debts.^b

*982 With respect to what shall be deemed notice, an executor or administrator is bound, at his peril, to take cognisance of debts upon record.^c And so of decrees in equity.^d But of other specialty debts, there must be actual notice, to render him liable *de bonis propriis* in case of a deficiency of assets, by reason of having paid debts of an inferior nature.^e

Creditors
of equal
degree.

4.—*Of the power of an executor to give a preference among creditors of equal degree.*] “The situation of an executor or administrator is frequently one of great difficulty. The law imposes on him the burthen of paying the debts of the testator in a particular order; and on the other hand, it confers on him certain privileges. One of these privileges is, that he has a right to retain for his own debt in preference to all other creditors of equal degree, and that among creditors of equal degree, he may pay one in preference to another. He may even after actions are commenced against him by a creditor on simple contract, confess a judgment in favor of another creditor of equal degree, and thus give the latter a preference.^f But if one of several creditors of equal degree, sues the executor and obtains judgment, he must be satisfied before the rest;^g and if one creditor commence an action, of which the executor has notice, he is restrained from making a *voluntary* payment to any other creditor of equal degree.^h And though an executor has power to confess judgment in favor of one creditor, after an action has been commenced against him by another creditor of equal degree, and thereby give a preference to the former, yet he cannot confess judgment to a stranger, or even to a creditor, for a larger sum than is due to him individually; therefore, *a judgment confessed by an executor to a creditor, as well for his own debt as in trust for the debts of other cre-

*983

^a B. N. P. 178.

^b *Sawyer v. Mercer*, 1 T. R. 690. *Britton v. Bathurst*, 3 Lev. 114.

^c *Littleton v. Hibbins*, Cro. Eliz. 793. Recognised in *Hickey v. Hayter*, 6 T. R. 388. *Dyer*, 32, a. in margin.

^d *Searle v. Lane*, Freem. Ch. Cas. 104. *Sorrell v. Carpenter*, 2 P. Wms. 483.

^e *Toller*, 292. *Wms.* 678. *Harman v. Harman*, 2 Show. 492. *Hawkins v. Day*, 1 Dick. 155. *Amb.* 162.

^f Per Abbott, C. J., in *Littleton v. Gross*, 3 B. & C. 329; (10 Eng. C. L. 94;) who cites in support of the latter position, *Prince v. Nicholson*, 5 Taunton, 333. (1 Eng. C. L. 124.) It is not necessary that process should be taken out by the creditor to whom judgment is confessed. *Mackreth v. Jackson*, 1 M. & S. 408, n. See 2 Saund. 51.

^g *Went. Off. Ex.* 282. *Ashley v. Pocock*, 3 Atk. 208.

^h *Went. id.* 1 Saund. 33, a. n. 8 Com. Dig. Admin. (C. 2.) *Parker v. Dee*, 3 Swanst. 531.

ditors, cannot be pleaded in bar to an action brought against him by another creditor.*

5.—*Power of an executor to retain his own debt.*] It is ^{Right of} Retainer. one of the privileges of an executor, or administrator, that he has a right to retain a debt due to himself from the deceased, in preference to all other creditors of equal degree.⁽¹⁾ But he cannot retain his own debt as against those of a higher degree, nor in prejudice to that of his co-executor in equal degree.* He may retain, not only for debts due to him in his own right, but also for debts due to him as trustee. As where *A.*, before marriage, covenanted with *B.* and *C.*, to leave them by his will, or that his executors, after his death, should pay them 700*l.*, in trust to pay the interest to his wife for life, remainder over, and having died intestate before his wife; it was held, *B.*, in the character of administrator, might retain assets to that amount, against a bond creditor, who sued before the six months were elapsed.⁴ So where a husband, on marriage, gave a bond to trustees, conditioned to pay to the wife 3000*l.*, if she survived him; the husband died, leaving the daughter and the wife living, the wife having administered *durante minore ætate* of the daughter; it was held, that she might retain for the money due on the bond.*

But if the trust money is to be paid to the trustees, in trust not to pay the capital to the administrator, but to lay it out to secure an annuity for him, he has no right to retain the principal sum. As where *A.*, before marriage, covenanted that his executors, or administrators, should pay to the trustees the sum of 400*l.*, in trust to secure, out of the proceeds, an annuity *of 20*l.* to the wife for life; it was held, that the wife, as ad- *984 ministratrix, could not retain the 400*l.*^f

* Tolputt v. Wells, 1 M. & S. 395.

^b *Ante*, 982. Woodward v. Lord Darcey, Plowd. 184. Dyer, 2, a, in margin. Bond v. Green, 1 Brownl. 75. 3 Bl. Com. 18.

^c 3 Bl. Com. 19.

^d Plumer v. Marchant, 3 Burr. 1380. See also Cockroft v. Black, 2 P. Wms. 298. Franks v. Cooper, 4 Ves. 763. Loomes v. Stotherd, 1 Sim. & Stu. 461.

^e Roskelly v. Godolphin, Sir Thos. Raym. 483. Marriot v. Thompson, Willes, 186. Loane v. Casey, 2 Bl. 965.

^f Thompson v. Thompson, 9 Price, 464.

(1) (*Page v. Patton*, 5 Peters, 304. *Decker v. Miller*, 9 Paige, 149.)

SECTION X.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR IN
RESPECT OF THE ACTS OF THE DECEASED.

In respect of what contracts or other acts of the deceased an executor or administrator is liable.

AN executor or administrator so completely represents the testator, or intestate, that he is answerable, as far as he has assets, for any debts, bonds, contracts, express or implied, covenants, or *other duty*, on which the deceased might have been sued in his lifetime.^a It has been held, that an action might be maintained against the executor of an attorney for negligence by the deceased in transacting the business of the plaintiff.^b Executors and administrators more actually represent their testator, or intestate, than the heir does the ancestor; for if a man binds himself, his executors or administrators are bound, *though not named*; but it is not so of the heir.^c The personal representative of a tenant may be charged for breaches of a covenant by one to whom the premises have come by assignment since the death of the tenant.^d An executor is bound by his testator's agreement not to bring error, and such an agreement precludes him from bringing error on a judgment in *scire facias*, brought to make him party to the former judgment, since that is not a new action, but a continuation of the old one.^e

- *985 A proviso made upon good consideration by a testator, that *his executor shall pay, is a sufficient consideration for *assumpsit* against the executor; and in such action it is not necessary to aver assets, or a promise by the executor.^f Where the cause of action is money due, or a contract to be performed, gain, or acquisition by the labor or property of another, or a promise by the testator, expressed or implied, the action survives against the executor.^g An action *ex contractu* lies against an executor for the value of timber wrongfully cut down by the testator.^h Where a man covenanted that *A.* should serve *B.* as an apprentice for seven years, and died; it was held, that if *A.* departed within the term, an action of

^a 1 Saund. 216, *a.* Com. Dig. Admin. (B. 14.) Bac. Ab. Executors, (P. 1.) 3. In every case where the testator is bound by a covenant, the executor shall be bound by it, if it be not determined by the death of the testator. Bro. Cov. Pl. 12, that is, unless it be such as was to be performed by the person of the testator. Cro. Eliz. 553. Clark v. Thompson, Cro. Jac. 571. Berisford v. Woodroff, *id.* 404.

^b Wilson v. Tucker, 3 Stark. 154. (14 Eng. C. L. 174.) See *ante*, 197, *n.*

^c Co. Litt. 209, *a.* Wentw. c. 11.

^d Wilson v. Wigg, 10 East, 313. See Tremere v. Morison, *post*, 991.

^e Wright v. Nutt, 1 T. R. 388.

^f Powell v. Graham, 7 Taunt. 580. Burrough, J., *dissentiente*.

^g Hambly v. Trott, Cowp. 375. But trover does not lie against him for a conversion by his testator.

^h Utterson v. Vernon, 3 T. R. 549.

covenant lay against the executor of the covenantor without naming him.^a

But where a contract is *personal* to the testator or intestate himself, his representatives are not liable, unless a breach was incurred in the lifetime of the deceased.^b As if an author undertakes to compose a work, and dies before it is completed, his executors are discharged from the contract, for the undertaking is merely personal in its nature, and by the intervention of the contractor's death, has become impossible to be performed.^c So a covenant by a master to instruct his apprentice is personal, and his executors are not liable upon it.^d So where *A.*, a newsman, assigned his business, and covenanted that he would not exercise the business of a newsman, &c., and in consideration of the premises, the defendant covenanted to pay 8s. a week to the said *A.*, his executors and administrators, during his own life and that of his wife, and after his death his wife administered, and commenced the business of a news-vender; the court held, that she was not bound by the covenant of her husband, and grounded their judgment on the difference of expression in the two clauses, viz.:—that *A.* himself, without naming his executors, should abstain from the business, but that the payment was to be made to his executors, &c.*

When an executor is not liable on the personal contracts of the deceased.

*986

It was a principle of the common law, that if any injury were done, either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person *to* whom, or *by* whom the wrong was committed. And at this day, where the cause of action is founded upon any *malfesance*, or *misfesance*, is a *tort*, or arises *ex delicto*; such as trespass for taking goods, &c., trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, escape, and many other causes of the like kind, where the *declaration* imputes a *tort* done either to the person or property of another, and the *plea* must be not guilty, the rule is, *actio personalis moritur cum persona*; and if the person by whom the injury was committed dies, no action of this kind can be brought *against* his executor or administrator.⁽¹⁾

An executor or administrator is not liable for the torts of the deceased.

An action does not lie against an executor or administrator on a penal statute.^e So if a man served with a *subpoena*, and

^a Bac. Ab. Executors, (P. 1.) Bro. Cov. 12.

^b Hyde v. The Dean of Windsor, Cro. Eliz. See *ante*, 668.

^c Marshall v. Broadhurst, 1 Tyrwh. 349.

^d Baxter v. Burfield, 2 Stra. 1266. Wms. 1061. But they continue liable on his covenant for the *maintenance* of the apprentice. *Id.* R. v. Peek, 1 Salk. 66.

^e Cooke v. Calcraft, 2 Bl. 856. 3 Wils. 380.

^f 1 Saund. 216. a. But see 3 & 4 W. IV, c. 42, *post*, 996.

^g Wentw. 255. Wms. 1064.

(1) (*The People v. Gibbs*, 9 Wend. 29. At common law no executor was answerable for a *deceit* by his principal, but this was remedied by St. Car. 2, c. 7, and 4 & 5 W. & M. c. 24. *Sibley v. Williams*, 3 Gill & Johns. 52.)

having had his expenses tendered to him, neglects to appear as a witness, and dies, no action lies against his executor or administrator.^a So if a sheriff or gaoler suffer a person in execution for debt to escape, though such sheriff or gaoler is liable to an action at the suit of the creditor, yet no action lies against his executor or administrator; because, suffering the escape was a wrong of the nature of a trespass.^b

But though the general rule is, that an executor or administrator is not answerable for the acts of the deceased in a form of action in which the plea is not guilty; yet in many of the cases above-mentioned, there is a remedy against him in another form. Thus, an action on the custom of the realm will not lie against *the executors of a carrier, because the plea in that form of action is not guilty, yet *assumpsit* will lie for the same cause of action.^c *Trover* will not lie against an executor for a conversion by his testator; yet if the goods taken continue in specie in the hands of the executor, *replevin* or *detinue* will lie to recover them back.^d Or in case they are sold, money had and received will lie to recover their value.^e An action of trespass for mesne profits cannot be maintained against an executor or administrator, yet he is liable in an action for use and occupation, for the rent up to the day of the demise, in an action of ejection.^f But if there has been a recovery in ejection, no action will lie against the executor for use and occupation for the rent subsequent to the day of the demise laid in the declaration; because, having treated the holding as founded in trespass, the plaintiff cannot afterwards treat it as founded in contract.^g By a recent statute, however, trespass will lie against an executor, or administrator, for any injury done by the deceased to the real or personal property of another.^h

^a *Id.*

^b *Id.* *Anon.* Dyer, 371. *Perkinson v. Gilford*, Cro Car. 540. *Berwick v. Andrews*, 2 Lord Raym. 973. 1 Saund. 216. a. An action of waste does not lie against an executor for waste committed by his testator; it being a tort which dies with the person. 2 Saund. 252.

^c *Powell v. Layton*, 3 N. R. 370. Per Lord Mansfield, Cowp. 375.

^d 1 Saund. 217.

^e *Id.* 1 Cowp. 377.

^f *Pulteney v. Warren*, 6 Ves. 86.

^g *Birch v. Wright*, 1 T. R. 378. *Bridges v. Smith*, 5 Bing. 410. (15 Eng. C. L. 481.)

^h 3 & 4 W. IV, c. 42, s. 2, *post*, 996.

SECTION XI.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR IN
RESPECT OF HIS OWN ACTS.

	PAGE		PAGE
1. When an executor will be liable in his representative capacity only.		2. When he will be answerable <i>de bonis propriis</i> .	989
		3. His liability, on an award.	991

1.—*When an executor will be liable in his representative capacity only.*] It was formerly considered that whenever an executor or administrator was sued on promises made by him after the death of the testator or intestate, he was liable personally, and not in his representative character.* But there are several *modern authorities to show that, in some cases, he may be answerable in his representative capacity on promises made by him in that character. Where one count in the declaration stated a promise by the testator in his lifetime, that in consideration the plaintiff would enter into his service, and would continue to serve him till his death, his executor should after his decease pay the plaintiff 20*l.*, and then averred the defendant's liability as executor, and that in consideration thereof, the *defendant promised* to pay the plaintiff that sum, &c.; held, that the defendant was liable on this count, not personally, but as executor only.†

When an executor will be answerable in his representative capacity only on promises made by him. *988

So where the declaration stated that a certain suit depending in chancery, was referred to arbitration, and that it was one of the terms of submission that the reference should not abate by the death of either of the parties; that before the making of the award, *B.*, one of the parties, died; that the arbitrator awarded that the executor should pay the plaintiff 225*l.* out of the assets of *B.*, and that being so liable the defendant, executor as aforesaid, *promised to pay*; held, that the executor was chargeable only in his representative character, and that judgment should be *de bonis testatoris*.‡ And “it is fully settled, that to a count on an account stated between the plaintiff and an executor as *such*, a plea of *plene administravit* would be a good plea, and that the only judgment which could be given, in favor of the plaintiff, would be a judgment *de bonis testatoris*.”§ “As to a count for money paid there may be some doubt; but the strong inclination of my opinion is, that that count is good as against an executor, and that the latter might plead *plene administravit* to it, and that the judgment should

* *Hawkes v. Saunders*, Cowp. 369. *Jennings v. Newman*, 4 T. R. 347. *Trewinian v. Howell*, Cro. Eliz. 91.

† *Powell v. Graham*, 7 Taunt. 581. (2 Eng. C. L. 223.) 1 Moore, 305.

‡ *Dowse v. Coxe*, 3 Bing. 20.

§ Per Lord Tenterden, in *Ashby v. Ashby*, 7 B. & C. 447. (14 Eng. C. L. 77.)

*989 be *de bonis testatoris*.”^a But a count for money had and received, is a *personal* charge, and does not warrant a judgment *de bonis testatoris*.^b An executor or administrator may be liable, as the owner of the improved rent, for the expenses of pulling down and rebuilding *a party-wall under the authority of the building act, (14 Geo. III, c. 78, s. 41,) even though he has no other assets than the improved rent; for the expenses of pulling down and rebuilding a party-wall, are a charge upon the land in the hands of the owner of the improved rent; therefore, where an administrator was sued upon the statute, and pleaded that he was only the owner in his character of administrator in right of his intestate, and after setting out an unsatisfied judgment against himself, also as administrator, alleged that he had fully administered all the estate, but a sum which was not sufficient to satisfy the judgment; held, on demurrer, that the plea was no answer to the action.^c

An executor, who gives no orders for the funeral of his testator, is liable only to the extent of the expenses of a funeral suitable to the rank and circumstances of the testator. And it seems that he is not liable at all where the funeral is ordered by another person, to whom the undertaker gives credit.^d

Where the attorney of one who had a claim on the estate of a testator, wrote a letter to the executrix, stating that the creditor did not claim the debt from her as executrix, but that he claimed it from her individually, on the ground of her having become liable by having paid the interest for the debt from time to time; it was held, that the letter did not release her from her liability as executrix;^e for the reason given for the alteration of the liability was untenable in point of law, because there was no consideration for the change, and even if there was, there was no promise in writing to satisfy the statute of frauds.^f

When an executor will be liable *de bonis propriis*. 2.—*When an executor will be answerable de bonis propriis.*] A promise by an executor or administrator to pay a debt of the deceased, will not render him *personally* liable, unless it be in *writing*,^g and there be a sufficient *consideration*.^h Forbearance *to sue an executor (having assets) for a *certain* time is a good consideration for a promise by the executor.ⁱ So

^a *Id.* And Holroyd, J., thought that the judgment on that count might be *de bonis testatoris*. *Id.* 451.

^b *Id.* See *Rose v. Bowler*, 1 H. Bl. 106. *Brigdon v. Parkes*, 2 B. & P. 424.

^c *Thacker v. Wilson*, 1 Harr. & Woll. 131. 3 Ad. & Ell. 142. (30 Eng. C. L. 56.) 4 N. & M. 659.

^d *Brice v. Wilson*, 3 Nev. & M. 512.

^e *Richards v. Browne*, 3 Hodges, 27. 3 Bing. N. C. 349. (32 Eng. C. L.)

^f By the statute of Frauds, 29 Car. II, c. 3, s. 4.

^g At the common law, an executor or administrator could not have been charged on any special promise to answer damages out of his own estate, unless such promise had been made on a sufficient consideration. S. N. P. 794. *Rann v. Hughes*, 4 Bro. P. C. 27. 7 T. R. 350. n. *Philpot v. Briant*, 4 Bing. 717. (15 Eng. C. L. 126.)

^h 1 Saund. 210. b. 5th Ed. *Bond v. Payne*, Cro. Jac. 273. *Fish v. Richardson*, *id.* 47.

forbearance to sue for a *reasonable* time, although the executor have not assets, is a sufficient consideration to charge him *de bonis propriis*.^a So forbearance of a suit for a legacy, was held to be a sufficient consideration to render the executor personally liable; though it was said that if it had appeared by the declaration that the plaintiff had no cause of action, the forbearance would not be sufficient.^b Where two executors gave a promissory note to the plaintiff, in the following words, "as executors to the late T. S., we severally and jointly promise to pay to N. C. the sum of \$001. on demand, with *lawful interest* for the same;" held, that they were personally liable on the note, on the ground that the promise, from the circumstance of interest being added, necessarily imported a payment at a future day, and an executor promising to pay a debt at a future day makes the debt his own.^c

Where a bill is indorsed to certain persons, *as executors*, and they again indorse it, they become personally liable.^d So where the husband of the defendant, executrix, was indebted to the plaintiff in 50*l.*, and she in consideration that the plaintiff would deliver to her six barrels of beer, promised to pay the plaintiff, as well the 50*l.* due by the intestate, as for the barrels delivered to herself; held, that she was personally liable in *assumpsit* for both debts, and that the judgment should be *de bonis propriis*.^e

It is a general rule that the executor of a lessee is liable as assignee, except that with respect to rent, his liability does not exceed what the property yields. In an action *for use and occupation, charging the defendant in his own character, who was an administrator of the original lessee, for rent due after the intestate's death; held, that although the defendant had taken possession, yet, having proved that the premises had been productive of no profit to him, and that eight months after the death of the intestate, he had offered by parol to surrender them to the plaintiff, such proof constituted a good defence to the action.^f But if the premises be of any value, or productive of any profit, though less than the rent, the executor or administrator, will be liable as assignee during the term, for so much as they are worth.^g The rule, however, with re-
Liability of the executor of a lessee for rent.
*991
Liability in respect

^a Johnson v. Whitcott, 1 Roll. Ab. 24. 1 Saund. 210. b.

^b Childs v. Monins, 2 B. & B. 460. (6 Eng. C. L. 200.) 5 Moore, 281. But see Bowerbank v. Monteiro, 4 Taunt. 844.

^c Davis v. Reyner, 2 Lev. 3.

^d Per Buller, J., King v. Thom, 1 T. R. 489.

^e Wheeler v. Collier, Cro. Eliz. 406. Where the defendant is personally liable, the judgment will be *de bonis propriis*, although he be charged as promising as executor. Powell v. Graham, 7 Taunt. 585. (3 Eng. C. L. 235.) Wigley v. Ashton, 3 B. & A. 101. (5 Eng. C. L. 238.)

^f Remnant v. Bremridge, 2 Moore, 94. 8 Taunt. 191. (4 Eng. C. L. 66.)

^g Ruberry v. Stevens, 4 B. & Ad. 241. (24 Eng. C. L. 50.) 1 Saund. 112, 5th Ed. Where the result of the authorities on this point is laid down.

of cove-
nants.

fore, where an administrator had occupied premises demised to the intestate, it was held to be no plea to an action of covenant for non-repair, that the premises yielded no profit.^a So he is liable for waste done in his own time, and the judgment for damages shall be against him *de bonis propriis*.^b

The *consideration* of the promise must be in writing, as well as the promise itself, otherwise it is void.^c It is, however, sufficient if the consideration can be gathered from the whole tenor of the writing, and it is not necessary that it should be stated on the face of it in express terms.^d

When an
executor
or admin-
istrator is
personally
liable on
an award.

*992

3.—*Liability of an executor on an award.*] If an executor or administrator refers generally all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to such an admission.^e And if he submits to pay whatever will be awarded, he is personally bound to perform the award, whether he has assets or not. As where the defendant *bound* himself as *administrator* to abide by "an award to be made touching matters in dispute between the intestate and another, and the arbitrator awarded that the defendant, as *administrator*, should pay the plaintiff the sum of 208*l.*; it was held that the defendant could not plead *plene administravit* to an action on the bond for the bond was a personal engagement by him to perform the award, without any regard to assets.^f So, where on a reference, the arbitrator ascertained the amount of the claim of a creditor on the estate of the deceased, and directed that the administrator should pay it; it was held, that as the arbitrator had awarded the defendant to pay the amount, it was equivalent to determining as between the parties that he had assets to pay the debt, and that he might be attached for non-payment.^g

When he
is not lia-
ble.

But a mere submission to arbitration will not render an executor or administrator *personally* liable. As where the defendant, as administrator, submitted the matters in difference to an arbitrator, who awarded that a certain sum was due from the intestate to the plaintiff, without saying by whom it was to be paid; it was held, that the defendant might plead *plene administravit* to an action for the sum awarded.^h So

^a Tremere v. Morison, 1 Bing. N. C. 89. (27 Eng. C. L. 315.)

^b Per Tindal, C. J., *id.* 96.

^c Waia v. Warites, 5 East, 10. Saunders v. Wakefield, 4 B. & A. 595. (6 Eng. C. L. 531.) Jenkins v. Reynolds, 3 B. & B. 14. (7 Eng. C. L. 328.) 1 Saund. 24, 5th Ed.

^d *Id.* Stadt v. Lill, 9 East, 348. Bateman v. Phillips, 15 East, 271. 1 Camp. 248. Russell v. Moseley, 3 B. & B. 211. (7 Eng. C. L. 414.) Stead v. Liddard, 1 Bing. 194. (8 Eng. C. L. 394.) 8 Moore, 2.

^e Per Lord Eldon, in Robson v. —, 2 Rose, 50.

^f Barry v. Rush, 1 T. R. 691.

^g Worthington v. Barlow, 7 T. R. 453. Riddell v. Sutton, 5 Bing. 200. (15 Eng. C. L. 416.) 2 M. & P. 245.

^h Pearson v. Henry, 5 T. R. 6.

where an arbitrator awarded that a certain sum was due from the testator, and directed that sum to be paid by the executor *out of the assets*, on or before a certain day; the court said, that the latter part did not conclude the question of assets, but left it open; and that if the executor had fully administered at the day that was fixed for the payment he would not be bound to pay.^a Where a cause was referred to arbitration the costs being to abide the event, and the action was brought by an administrator with counts in the declaration on promises to himself as administrator, and the arbitrator awarded that the plaintiff had no cause of action; held, that the plaintiff was liable to an attachment for not paying the costs, and that the terms of submission could not be varied by affidavits showing that it was not the intention to make him personally liable.^b

*SECTION XII.

*993

ACTIONS BY EXECUTORS AND ADMINISTRATORS.

	PAGE		PAGE
1. In what cases an executor may maintain an action.		3. The declaration.	998
2. Of the joinder of parties.	996	4. The pleadings.	1001
		5. Evidence.	1001

1.—*In what cases an executor may maintain an action.*] An executor or administrator so completely represents the deceased in respect of his personalities, that it is an established rule, that any right of action founded on any contract, covenant, debt or other duty, on which the deceased might sue in his lifetime, is transmitted to his executor or administrator.^c At common law, no action of account lay for an executor or administrator, upon the principle that the account rested in the privity and knowledge of the testator only.^d But this remedy has been given to executors by the statute of Westminster (1 Edw. I, st. 1, s. 2,) to the executors of executors by statute 25

^a Love v. Honeybourne, 4 D. & R. 814. (16 Eng. C. L. 222.)

^b Spiry v. Webster, 3 Dowl. P. C. 46.

^c 1 Saund. 216, *a. n. ante*. As to contracts entered into with themselves, executors may sue in all cases where the money, when recovered, would be assets, as for a note indorsed to them, King v. Thom, 1 T. R. 487. Catherwood v. Chabaud, 1 B. & C. 154. (8 Eng. C. L. 45.) For goods sold by them, Cowell v. Watts, 6 East, 408; or for money paid by them in that character, Ord v. Fenwick, 3 East, 104. Where the testator entered into a parol contract to give a lease to the defendant, and died before it was executed, the contract being void by the statute of frauds, the plaintiffs being executors of the deceased made a new contract with the defendant for a similar lease, which was afterwards executed; held, that the plaintiffs might sue in their personal character on the contract. Grissell v. Robinson, 2 Hodges, 138. 3 Bing. N. C. 10. (32 Eng. C. L.)

^d Co. Litt. 89, b. Inst. 404. 1 Saund. 216, b.

Edw. III, c. 5, and to administrators by the 31 Edw. III, c. 11. It was also a principle of the common law, that when any injury was done to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person to whom the injury was done; the rule in such cases being, *actio personalis moritur cum persona*.^a

*994 But by the statute 4 Edw. III, c. 7, *de bonis asportatis in vita testatoris*, reciting "that in times past executors had not had actions for a trespass done to their testators, as of the goods of the said testators carried away in their life," it was enacted, "that the executor in such cases, shall have an action against the trespassers, and recover their damages in like manner as they, whose executors they be, should have had if they were living." This being a remedial law, has always been expounded largely, and though it makes use of the word *trespassers* only, has been extended to other cases within the meaning and intent of the statute; therefore, by an equitable construction of the statute, an executor or administrator shall now have the same actions for any injury done to the *personal estate* in his lifetime, whereby it has become less beneficial to the executor or administrator, as the deceased himself might have had whatever the form of action may be.^b It has been held, that the executor of a termor, (although he has demised for a longer term than his own) may maintain an action on the covenant for the stipulated rent, due since the death of his testator, on the *privity of contract*, although not on any supposed privity of estate.^c So an executor or administrator may by the equity of the statute, have a *quare impedit* for a disturbance in the time of the deceased.^d So he may bring *ejectment* where the testator had a lease for years and was ousted.^e So he may bring trespass or trover;^f or an action on the case against a sheriff for a false return, made to a *fi. fa.* in the lifetime of his testator.^g So, he may have an action against the sheriff for suffering a person in his custody in the lifetime of the testator, to escape.^h So, the executor of a purchaser may sue for a breach of contract on sale of an estate in fee simple, and the consequent loss of interest and expense.ⁱ But he cannot sue for the breach of the implied promise of an attorney *995 "to investigate the title to the freehold estate without stating that the testator sustained some actual damage."^j

The executor or administrator may maintain an action for injuries done to the personal estate of the deceased.

^a 1 Saund. 217.

^b Emerson v. Emerson, 1 Vent. 187. Berwick v. Andrews, Sir Wm. Jones, 174.

^c 2 Lord Raym. 974. 1 Saund. 217.

^d Baker v. Gosling, 1 Bing. N. C. 19. (37 Eng. C. L. 322.)

^e Went. 164. Smalwood v. Bishop of Coventry, Cro. Eliz. 207. 1 Leon. 205. Wms. 513.

^f Bro. Ab. Ex. 45. Slade's Case, 4 Co. 95.

^g Russell's Case, 5 Co. 57. Rutland v. Rutland, Cro. Eliz. 377.

^h Williams v. Grey, Lord Raym. 40.

ⁱ Berwick v. Andrews, 2 Lord Raym. 973. 1 Salk. 314.

^j Orme v. Broughton, 10 Bing. 533. (25 Eng. C. L. 231.) 4 M. & Scott, 417.

^k Knights v. Quarles, 4 Moore, 532. 2 B. & B. 102. (6 Eng. C. L. 34.) To this

But the statute does not extend to injuries arising from personal sufferings. An executor or administrator, therefore, cannot maintain an action for an assault, false imprisonment, slander, deceit, or the like;^a nor for a breach of a promise of marriage to the deceased, where no special damage to the personal estate can be stated on the record;^b nor can an executor sue for a breach, even in the lifetime of his testator, of a covenant relating to the realty, as for good title on a deed of conveyance, *without showing some special damage to the personal estate*, but the action must be brought by the heir or the devisee.^c But where the deceased was evicted, and the land and consequently the covenant did not descend to the heirs; it was held, that the executors only could sue.^d And in a recent case, where the defendant covenanted not to fell, stub up, tear, lop or top timber trees excepted out of the demise; it was held, that the executor of the deceased landlord might maintain an action on a breach of the covenant committed in the lifetime of the testator, no part of the timber loppings having been removed by the defendant, for the covenant was collateral and did not run with the land. The trees being excepted out of the demise, the covenant not to fell them was the same as if there had been a covenant not to cut down trees growing on an adjoining estate of the lessor.^e

But not for personal sufferings;

nor for a breach of covenant relating to the realty.

Nor did the statute extend to injuries done to the freehold of the deceased; consequently his executor or administrator could not maintain trespass *quare clausum fregit*, or an action for cutting down trees or other waste, in the lifetime of the deceased, on his freehold.^f

*But now, by the statute 3 & 4 W. IV, c. 42, s. 2, after reciting that there is no remedy provided by the law for injuries to the real estate of any person deceased committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another in respect of his property real or personal; it is enacted "that an action of trespass, or trespass on the case, may be maintained by the executors or administrators of any deceased person for any injury to the real estate of such person committed in his lifetime, for which such person himself might have maintained an action, provided such action be brought within one year after his death, and the damages recovered shall be part of the personal estate of such person; and that trespass may be maintained against executors or administrators for any wrong committed by the deceased in his lifetime

*996

Executors or administrators may maintain an action for an injury done to the real estate in the lifetime of the

case Mr. Chitty, in his Treatise on Pleading, p. 19, adds *sed, quare*, whether damage, viz. deterioration in value of saleable interest, would not be inferred.

^a 1 Saund. 217, a.

^b Chamberlain v. Williamson, 2 M. & S. 408.

^c Kingdon v. Nottle, 1 M. & S. 355. 4 *Id.* 53. 188. King v. Jones, 5 Taunt. 418. (1 Eng. C. L. 139.)

^d *Id.* Lucy v. Levington, 2 Lev. 26. 1 Vent. 175.

^e Raymond v. Fitch, 1 Gale, 337. 2 C. M. & R. 588.

^f Bro. Ex. Pl. 120. Williams v. Breedon, 1 B. & P. 329. Went. 103.

deceased, and they are liable to an action for injuries done to property by the deceased in his lifetime.

to another in respect of his real or personal property, provided that such injury shall have been committed within six calendar months before his death, and the action be brought within six calendar months after such executor or administrator shall have taken upon themselves the administration of the effects of the deceased; and the damages so recovered shall be payable in like order of administration as the simple contract debts of such person."

2.—*Of the joinder of parties.*] Where a personal contract is made *jointly* with two or more persons, and one or more of them die, the action on such contract must be brought in the name of the survivor, and the representatives of the deceased cannot be joined, nor can they sue separately; for it is a general rule that though the right of a deceased partner devolves on his executor, yet the *remedy* survives to his copartner or co-obligee, who alone must enforce the right of action, and will be liable on recovery to account to the executor or administrator for the share of the deceased.^a But if the interest of the covenantees be *several*, the executor of one of them may sue, though "the other be living, and though the language of the covenant be joint."^b If there be several executors or administrators they must all join, though some be under the age of *seventeen* or have not proved the will, or refused before the ordinary,^c for the grant of a probate to one enures to the benefit of them all;^d and it makes no difference that the issue is raised on a plea of *ne unques* executor.^e

Nonjoinder can be taken advantage of by abatement only.

If one *alone* of several executors or administrators bring an action either in form *ex contractu* or *ex delicto*, the defendant can only take advantage of the nonjoinder of his co-executor or co-administrator, by pleading in abatement after oyer of the probate or letters of administration, that the other executor or administrator is alive and not joined in the action. If the defendant plead the general issue he is too late, he cannot then come at the fact of there being another executor.^f If one executor of several sell the goods of his testator, he alone may maintain an action for the price, not naming himself executor.^g

^a *Martin v. Crump*, 2 Salk. 444. 1 Ld. Raym. 340. *Golding v. Vaughan*, 2 Ch. Rep. 437. 2 Saund. 117. *Camp v. Andrews*, Carth. 171. 3 Lev. 290. *R. v. Collector of Customs*, 2 M. & S. 293. *Anderson v. Martindale*, 1 East, 497. (6 Eng. C. L. 139.) *Barford v. Stuckey*, 2 B. & B. 333. 5 Moore, 23.

^b *Withers v. Bircham*, 3 B. & C. 256. (10 Eng. C. L. 68.) 1 Saund. 154.

^c *Bro. Ex. 88.* *Smith v. Smith*, Yelv. 130. *Brooke v. Stroud*, 1 Salk. 3. 1 Saund. 991, i. *Henslow's case*, 9 Rep. 37, a. *Lakin v. Watson*, 4 Tyr. 839. 2 D. 633.

^d *Per Bayley, J.*, in *Webster v. Spencer*, 3 B. & A. 363. (5 Eng. C. L. 317.) *Walters v. Pfeil*, M. & M. 369. (23 Eng. C. L. 334.) *Scott v. Briant*, *infra*. If a debtor make his creditor and another his executors, and the creditor neither prove the will, nor act as executor, he may sue the other for the debt though he has not renounced. 3 T. R. 557.

^e *Scott v. Briant*, 2 H. & Wol. 54. 6 N. & M. 381.

^f 1 Saund. 291, i.

^g *Brassington v. Ault*, 2 Bing. 177. (9 Eng. C. L. 369.) 9 Moore, 340. *Went. 224.* *Godolph. pt. 2, c. 16, s. 1.*

So, if goods be taken out of the possession of one of several executors, he may sue alone to recover them.^a If an executrix or administratrix marry, she and her husband must join in an action for the breach of any personal contract made with the deceased;^b if she sue alone, the defendant can only take advantage of it by abatement;^c but the husband may sue alone on a contract made with the husband and wife as executrix.^d

3.—*The declaration.*] If an executor or administrator sues in respect of a cause of action which occurred in the time of the deceased, he must declare in the *detinet*, that is in his representative capacity only.^e But it is laid down, that where the cause of action accrues after the death of the testator or intestate, as in case of contracts made with his representative as such, if the money recovered will be assets, the executor or administrator has his option to declare in his representative character, or in his own name.^f However, in all actions by an executor or administrator, the declaration should, in strictness, be only in the *detinet*, except in an action upon a judgment recovered against an executor suggesting a *devastavit*, when the *debet* and *detinet* is proper;^g and the defendant cannot in such action plead *plene administravit*.^h Where a plaintiff declares in the *debet* and *detinet* in a case which ought to be laid in the *detinet* only, it is demurrable; but it is otherwise where the plaintiff declares in the *detinet* only in a case which strictly ought to be laid in the *debet* and *detinet*; for a party may abridge his demand, although he cannot extend it.ⁱ(1)

*998
An executor should declare in the *detinet* only.

There is nothing peculiar relating to the form of the declaration in actions by executors. An executor or administrator should describe himself as suing in that character, and in stating the debt or promise to him, the words "as executor or administrator," should be inserted, or the omission will be fatal, even after verdict.^j Where in the general indebitatus count it

How an executor should describe himself.

^a *Id.* An executor or administrator may arrest a party in the same manner as if they were suing in their own right; and if they hold a party to bail without reasonable or probable cause, for a debt due to the deceased, they are within the provisions of 43 G. III. c. 46, s. 3. *Feely v. Reed*, 5 B. & A. 515, n. (7 Eng. C. L. 178.)

^b *Com. Dig. Bar. & Fem. (V.)* ^c *Milner v. Milnes*, 3 T. R. 631.

^d *Ankerstein v. Clarke*, 4 T. R. 616. *Yard v. Ellard*, 1 Salk. 117.

^e 1 Saund. 112. *Com. Dig. Pleader*, (2 D. 1.) *Gallant v. Bonteflower*, 3 Doug. 36. (26 Eng. C. L. 26.)

^f *Ord v. Fenwick*, 3 East, 103. *Cowell v. Watts*, 6 East, 405. *Clark v. Hougham*, 2 B. & C. 149. (9 Eng. C. L. 47.) *Marshall v. Broadhurst*, 1 C. & J. 403. 1 Tyrw. 308. *Partridge v. Court*, 5 Price, 412. *Catherwood v. Chabaud*, 1 B. & C. 150. (13 Eng. C. L. 45.) *Hosier v. Arundell*, 3 B. & P. 11. *Powley v. Newton*, 6 Taunt. 453. (1 Eng. C. L. 446.) *Webster v. Spencer*, 3 B. & A. 362. (5 Eng. C. L. 316.) *Wms.* 570. 1149. 1 Saund. 1.

^g *Com. Dig. Pleader*, D. 2. 2 W. 8. *Chitt. Pl.* 1, 361. 2, 248, n.

^h *Skelton v. Hawling*, 1 Wils. 258.

ⁱ *Wilson v. Hobday*, 4 M. & S. 120. 1 Saund. 1, a, 5th Ed.

^j 1 Saund. 112. *Henshall v. Roberts*, 5 East, 150.

(1) (*Adams v. Campbell*, 4 Verm. 447.)

*999 was stated that the defendant was indebted to the plaintiff as executrix for money lent by the plaintiff to the defendant; the other considerations in the same count were alleged to move from the plaintiff as executrix; the promise was alleged as made "to *the plaintiff, executrix, as aforesaid:" held, on special demurrer; that the declaration was vitiated by this misjoinder of different considerations in different rights, but that if they had all appeared to have been in the same right, it would be sufficient if any one consideration were properly averred, as the remaining considerations might be rejected.*⁽¹⁾

Profert. After the conclusion to the damage, &c., a *profert* of the letters testamentary should be made;^b and it should appear that the letters were granted by proper authority. Where in a declaration by an administratrix, the plaintiff made profert of letters of administration "duly granted by the Consistory Court of St. Asaph," without making the usual statement of the grant of letters of administration in the body of the declaration; held bad on special demurrer, as not showing that the letters of administration were granted by the proper authorities; held, also, that the omission of the date of the grant was immaterial.^c The omission of the profert is, however, aided by 4 Anne, c. 16, unless specially demurred to.^d

What counts or causes of action may be joined.

The plaintiff cannot join in the same declaration a demand as executor or administrator, with a claim in his own right; in case of a misjoinder, the declaration will be bad on a general demurrer; or in arrest of judgment; or in error.^e But whenever the money recovered on each count will be assets, the counts may be joined in the same declaration.^f Therefore the same declaration which contains counts on promises to the testator may contain a count on an account stated with the plaintiff as *executor*, concerning money due to the testator from the defendant, or concerning money due to the plaintiff as executor.^g So, counts on promises made to a testator or intestate may be joined with counts on a promissory note given to the

* M'Clelland v. M'Adam, 1 Alcock & Napier, 488.

^b Bac. Ab. Exec. C.

^c Hughes v. Williams, 2 C. M. & R. 331. 4 Dowl. 169. 1 Gale, 235.

^d 2 Saund. 9, n. 12. Com. Dig. Pl. (O.) 3.

^e 2 Saund. 117, c. 1 Ch. Pl. 205. ^f *Id.*

^g Thompson v. Stent, 1 Taunt. 322. Cowell v. Watts, 6 East, 405. Needham v. Corke, Freem. 538. Powell v. Graham, 7 Taunt. 580. (2 Eng. C. L. 223.)

(1) (The rule is, that when the action is on a contract with the *decedent* or for a tort to the goods, before they have actually come to the *executor's possession*, it can be maintained by him only on the decedent's title, and consequently only in a representative character, but where it is on a contract express or implied, which has sprung up or been created since the decedent's death, or for a tort to the goods in the executor's possession, or for converting or detaining them, having escaped from his possession, or for the price of them having been sold by him, it can be maintained by him only in his own right; and the naming himself executor will not change its nature. Per Gibson C. J. in *Kline v. Guthart*, 2 Penn. R. 491. *Kendall v. Lee*, 2 Penn. R. 485. *Boggs v. Bard*, 2 Rawle, 102. *Adams v. Campbell*, 4 Verm. 447. *Stiles v. Causton*, 2 Gill & Johns. 49. *Turner v. Plowden*, *Id.* 455. *Sasscer v. Walker*, 5 *Id.* 102.)

plaintiff as administrator or executor,^a or to a count for money lent by the plaintiff as executor,^b or to a count for money had and received by the defendant to the use of the plaintiff as executor,^c or a count for materials found, and work and labor done by the plaintiff as executor.^d So a count for work done by the plaintiff as administrator may be joined with counts for goods sold by the intestate on promises to him; for the work may have been done in completing a contract of the intestate's for the benefit of the estate.^e So, in a declaration in debt, a count on a judgment recovered by the plaintiff as executor, may be joined with counts on debts which accrued to the testator.^f

But an executor cannot join in the same declaration a count for a demand which accrued to him in *his own right*, with a count on a cause of action which is laid to have been vested in him as executor or administrator.^g He cannot join a count upon a bond given to his testator with a count upon a bond given to him as executor; for the executor by taking the bond would extinguish the original debt, and it would not, when recovered, be assets; on such a bond he must declare in his own name.^h(1)

What counts cannot be joined.

In every count stating a debt or promise to the plaintiff in his representative capacity, it must be averred that it accrued to him "*as executor*," or "*as administrator*;" it is not enough to say, that it accrued to him "*executor*."ⁱ But where a count stating that the defendant had accounted with the plaintiffs "*executors as aforesaid*," was joined with counts stating promises to the testator; after verdict and judgment for the plaintiffs, a writ of error was brought upon the ground of misjoinder, and the House of Lords affirmed the judgment with costs.^j

*1001

4.—*The pleadings.*] The defendant, besides the ordinary

^a Partridge v. Court, 5 Price, 412, affirmed in error, 7 *id.* 591. Catherwood v. Chabaud, 1 B. & C. 150. (8 Eng. C. L. 45.) 1 Ch. Pl. 303.

^b Webster v. Spencer, 3 B. & A. 365. (5 Eng. C. L. 316.) Gallant v. Boute-flower, 3 Doug. 31. (26 Eng. C. L. 26.)

^c Dowbiggin v. Harrison, 9 B. & C. 669. (17 Eng. C. L. 470.) Clark v. Hongham, 2 B. & C. 149. (9 Eng. C. L. 47.)

^d Edwards v. Grace, 2 Mees. & Wels. 190. See Ord v. Fenwick, 3 East, 108.

^e Marshall v. Broadhurst, 1 C. & J. 403. 1 Tyrw. 308.

^f Crawford v. Whittall, 1 Doug. 4, n. So an executor may in the same declaration declare for rent due in his own time, and for that which accrued in the testator's time. Taylor v. Holmes, Freem. 367.

^g 3 Saund. 117, c. 1 Ch. Pl. 204.

^h *Id.* Hosier v. Lord Arundell, 3 B. & P.

ⁱ Henshall v. Roberts, 5 East, 150. 2 Saund. 17, c. 1 Ch. Pl. 204.

^j Lancefield v. Allen, 1 Bligh. N. S. 592. Where the affidavit of debt and writ stated the debt to be due to the plaintiffs "*executors of*," and not "*as executors of*," and the declaration stated it to be due to them in their own right; held, no variance. 1 Dow. 97.

(1) (On joinder of counts, see *Bank of Pennsylvania v. Haldiman*, 1 Penn. R. 161. *Hapgood v. Haughton*, 10 Pick. 154. *Howard v. Powers*, 6 Ohio, 93. *Fry v. Evans*, 8 Wend. 305.)

Plea of
ne unques
executor.

defences, may deny the plaintiff's representative character by pleading *ne unques* executor or administrator; but since the rules of H. 4 W. IV, the plaintiff's title as executor or administrator must be taken as admitted, unless specially denied, it cannot be disputed under the general issue. Under the plea of *ne unques* executor, the defendant may show that the probate is void, as that the stamp is insufficient, or the seal forged; but he cannot take advantage of such defect under the general issue.^a Where letters of administration have been obtained in an inferior diocese, the defendant may plead in bar, that there were *bona notabilia*, and may give that fact in evidence under the plea of *ne unques* executor;^b for we have seen in such case, the ordinary has no jurisdiction to grant probate, and the grant is therefore void.^c If the defence be that the letters of administration were unfounded, on the ground that the defendant did not reside within the diocese of the bishop who granted administration, but in a different province at the time of the death of the intestate, that fact should be specially pleaded; it cannot be given in evidence under the plea, "that the plaintiff was not, nor is administrator," &c.^d

Proof of
the title of
executor
or admin-
istrator.

*1002

5.—*Evidence.*] When the representative character of the plaintiff is denied by plea, he must prove his title as executor or administrator. The title of an executor is established by proof of the death of the testator and by the production of the probate. The seal of the ecclesiastical court on the probate proves itself.^e If the probate be lost, the ecclesiastical court will grant an exemplification, which will be evidence of the proving of the will.^f Or the act book of the court, containing an entry of the will having been proved, &c., will be sufficient without accounting for the non-production of the probate.^g The original will, though produced by the officer of the court cannot be read in evidence unless it bear the seal of the court or some other mark of authentication.^h Where there are several executors, probate to one only is evidence of the title of all.ⁱ The title of the plaintiff as administrator may be proved by the production of the letters of administration, or of a certificate or exemplification thereof granted by the ecclesiastical court,^j or by the original book of acts directing the grant of the letters,^k or by an examined copy of the act book.^l

^a *Thynne v. Protheroe*, 2 M. & S. 555. 1 Saund. 375.

^b 1 Saund. 274, n. 3. ^c *Ante*, 969.

^d *Stokes v. Bate*, 5 B. & C. 491. (11 Eng. C. L. 289.)

^e 2 Stark. Ev. 316. *Kempton v. Cross*, *Cas. temp. Hardwicke*, 106.

^f *Shepherd v. Shorthoze*, 1 Stra. 412. B. N. P. 246.

^g *Cox v. Allingham*, Jacob, 514.

^h *R. v. Barnes*, 1 Stark. 243. (2 Eng. C. L. 374.) *Pinney v. Pinney*, 8 B. & C. 335. (15 Eng. C. L. 230.)

ⁱ *Walters v. Pfeil*, M. & M. 363. (22 Eng. C. L. 334.)

^j B. N. P. 246. 1 Phill. Ev. 378.

^k *Id.* *Eden v. Kedell*, 8 East, 187. Per Bayley, J., in *Ramsbottom v. Buckhurst*, 2 M. & S. 567. ^l *Id.*

SECTION XIII.

ACTIONS AGAINST EXECUTORS OR ADMINISTRATORS.

	PAGE		PAGE
1. When and how an executor or administrator may be sued.		2. The declaration.	1004
		3. The pleadings.	1005

1.—*When and how an executor or administrator may be sued.*] We have already considered in respect of what acts and contracts of the testator and of his own, an executor is liable.^a It is here proposed to show how his liability may be established in a court of law. Formerly an action of *debt* did not lie against an executor or administrator upon a simple contract when the testator or intestate could have waged his law.^b But wager of law having been abolished by the 3 & 4 W. IV, c. 42, s. 13, it is enacted by s. 14, of the same statute, “that an action of debt on simple contract shall be maintainable in any court of common law against any executor or administrator.”

*An action at law cannot be maintained for a legacy, the remedy being in a court of equity;^c nor will it lie for the distributive share of an intestate's property, although the executor or administrator may have expressly promised to pay.^d(1) But an action will lie for a *specific legacy* after the executor has assented; for after such assent, the interest in the thing bequeathed vests at law in the legatee.^e The executors of a will under which *A.*, an insolvent debtor, was entitled to a legacy, gave his assignees a balanced account, wherein they admitted 622*l.* to be the amount of the legacy; but, on the other side, they debited the insolvent with a loan of 400*l.*, advanced on the security of the legacy when it was in reversion; the assignees proved at the trial that the instrument by which the

^a *Ante*, 984, *et seq.*

^b *Barry v. Robinson*, 1 N. R. 293.

^c *Deeks v. Strutt*, 5 T. R. 690, overruling *Atkins v. Hill*, Cowp. 284, and *Hawkes v. Saunders*, *id.* 289; and see *Gorton v. Dyson*, 1 B. & B. 219. (5 Eng. C. L. 63.)

^d *Jones v. Tanner*, 7 B. & C. 542. (14 Eng. C. L. 97.)

^e *Paramour v. Yardley*, Plow. 539. *Young v. Holmes*, 1 Stra. 70. *Doe v. Guy*, 3 East, 190. *Williams v. Lee*, 3 Atk. 223. *Bastard v. Stukeley*, 2 Lev. 209. Where an executor, before a sale of the goods of a deceased testator, tells a legatee, that she may purchase to a certain amount, (the amount of her legacy,) and that such purchase shall be an off-set to her legacy; such declaration amounts to a special contract as to the mode of payment, and may be given in evidence in an action for the value of the goods sold, brought by the executor, though the sale was by auction, subject to written particulars of sale. *Bartlett v. Pernell*, 2 H. & W. 16.

(1) (As to actions against executors for legacies and distributive shares, see *App v. Dreischack*, 2 Rawle, 287. *Bisler v. Kunkle*, 17 Serg. & R. 298. *Foult v. Brown*, 2 Watts, 213. *Morrow v. Brenisset*, 2 Rawle, 185. *McCulloch v. Sample*, 1 Penn. R. 424, 2 Penn. 494. *Masterson v. Masterson*, 5 Rawle, 137. *Doebler v. Snively*, 5 Watts, 225. *Knapp v. Hanford*, 7 Conn. 132. *Krat v. Somerville*, 7 Gill & Johns, 265.)

loan was secured was void under the insolvent act; held, that the assignees were entitled to recover the whole of the legacy, as the assignment was fraudulent.^a

All who have administered must be joined.

In an action against executors or administrators, all who have administered must be joined. And if a defendant pleads in abatement, that he has one or more co-executors, who ought to be joined, he must aver not only that the co-executor is alive, but that he has *administered*, because it is only necessary to sue as many co-executors as have administered.^b In an action against a married woman, executrix, the husband must be joined as a defendant, and they must both plead, otherwise it will be a discontinuance.^c It was held, before the uniformity

*1004 of process act, that *the defendant might be declared against as executor or administrator, although the process only described him generally, the object of the writ being merely to bring him into court.^d

Where an action was brought against two persons, being the executors of a deceased testator, for the use and occupation by them of the demised premises, an entry and occupation by one of them was proved; held, that it did not enure as that of both, so as to make them jointly liable *de bonis propriis*, in assumption for use and occupation.^e

Joinder of counts.

2.—*The declaration.*] In an action against an executor as such, a count cannot be introduced charging him *individually*, for the judgment in the one case is *de bonis propriis*, and in the other *de bonis testatoris*.^f Therefore a count for money had and received by the defendant as executor, or for money lent for the use of the plaintiff, to him as such, cannot be joined with a count on a promise made by the testator.^g So, a count upon a promise by the defendant as executor for use and occupation after the death of the testator cannot be joined with a count on promises by the testator to pay rent, as the former makes the defendant personally liable, the latter makes him liable to the extent of assets only.^h In an action of covenant against an executor the plaintiff may join a count for breach by the testator with a count for a breach after his decease,ⁱ and a count on an account stated by an executor as such, of moneys from the defendant as executor, may be joined with counts on promises by the testator, for on such count the judgment will be *de bonis testatoris*.^j

^a *Rose v. Savory*, 1 Hodges, 269. 2 Scott, 199.

^b *Hilbert v. Lewis*, Freem. 268. 1 Saund. 291, *k*. *Swallow v. Emberson*, 1 Lev. 161. *Alexander v. Mawman*, Willes, 42. Com. Dig. Abatement, (F. 10.)

^c Com. Dig. Admin. (D.) *Aylworth v. Fenn*, Freem. 351.

^d *Watson v. Pilling*, 3 B. & B. 4. (7 Eng. C. L. 323.) 6 Moore, 66.

^e *Nation v. Tozer*, 4 Tyr. 561. 1 C. M. & R. 172.

^f 2 Saund. 117, *c*.

^g *Id.*

^h *Wigley v. Ashton*, 3 B. & A. 101. (5 Eng. C. L. 238.)

ⁱ *Wilson v. Wigg*, 10 East, 313.

Powell v. Graham, 7 Taunt. 580. (2 Eng. C. L. 223.) 1 Moore, 305.

So, an account stated by the defendant *as* executor, of moneys due *from the testator*, may be joined with counts on promises by the testator; and this is the common mode of declaring against executors and administrators to save the statute of limitations.^a

*3.—*The pleadings.*] In an action against an executor or administrator, the defendant may plead any matter which the testator or intestate might have pleaded.^b(1) In addition thereto, he may deny the character in which he is sued, by pleading *ne unques* executor or administrator, or that no assets had come to his hands;^c or that he had fully administered, or that he had administered with the exception of assets to a certain amount, which are not sufficient to satisfy the plaintiff; or he may plead a retainer to pay his own debt, or debts of a higher degree, due to third persons, as bonds, outstanding judgments, &c.^d The defendant cannot avail himself of either of these defences under the general issue.^e *1005

Where the defendant pleads *ne unques executor* or *administrator*, the onus of proving the affirmative of the proposition is on the plaintiff, who may support it by the production of the probate or letters of administration, &c.,^f or by giving secondary evidence of them after a notice to produce the documents themselves being served on the defendant.^g Some proof of the identity of the defendant, namely, that he is the person described in the documents as executor or administrator, must be given.^h Evidence, however, of such acts as will render the defendant liable as executor *de son tort*, will be sufficient.ⁱ *Ne unques executor.*

The plea of *ne unques executor* does not deny the cause of action, but only that the defendant represents the deceased.^j Therefore, where in assumpsit against two defendants as executors, there was a plea by both of *ne unques executors*, and it appeared in evidence that one of the defendants was executor, and the other not; held, that the plaintiff might have a verdict against the former, on the counts laying the promises by the testator, and that the other defendant should be discharged, and that the plaintiff could not recover on counts upon promises by them both as executors.^k

^a 2 Saund. 117, *c.* *Secar v. Atkinson*, 1 H. Bl. 102.

^b Com. Dig. Pleader, (2 D. 8.) ^c *Id.* (2 D. 7. 13.)

^d 1 Saund. 300-306, *in notis*, Com. Dig. Pleader, (2 D. 9.) Tidd, 644, 9th Edit.

^e Co. Litt. 283, *a.* 1 Ch. Pl. 490. ^f *Id.* 974.

^g See *ante*, 1001.

^h Phil. Ev. 346, 6th Edit.

ⁱ *Id.*

^j As to what acts will make a man executor *de son tort*, see *ante*, 957.

^k 1 Saund. 207, *a.*

^l *Griffiths v. Franklin*, M. & M. 146. (22 Eng. C. L. 270.)

(1) (An executor or administrator is not bound to plead the statute of limitations, where he believes a debt to be justly due. *Smith's Estate*, 1 Ashmead, 352. When executors sever in pleading, the court will take that plea which is best for the estate. Per Iluston, J., in *Lyon v. Allison*, 1 Watts, 162.)

Plene administravit.

*Where the defendant pleads *plene administravit*, and the plaintiff replies that the defendant had assets, it is incumbent on the latter to prove assets existing when the writ was sued out.^a If the assets came into the hands of the defendant *after* the writ was sued out, the plaintiff should reply that fact specially; he will not be allowed to give it in evidence under the general replication.^b Where the defendant pleads *plene administravit præter* a sum which is not sufficient to satisfy an outstanding judgment, the plaintiff may reply that the judgment was kept on foot through fraud.^c Where an executor pleads *plene administravit*, and shows payments by him to the extent of the assets proved by the plaintiff to have come to his hands, the plaintiff may show in answer that the funds so applied did not come to the defendant as executor, but were handed to him in trust to pay the testator's debts, and were not part of the assets at first proved to have come to his hands.^d

Where an executor, after payment of all the debts of which he had notice, invested part of the residue of the personal estate in the funds in his own name for the benefit of the residuary legatees; held, in an action against him, fifteen years after the death of the testator, on a specialty debt of which he had no notice, the facts above stated would not sustain a plea of *plene administravit*, for he had the estate of the testator still in his hands, and had complete control over it.^e

Judgment recovered.

Where an administrator, after obtaining time to plead on the usual terms, pleaded a judgment recovered since the commencement of the action, but did not aver that there were no assets ultra, the court gave leave to the plaintiff to sign judgment as for want of a plea; the defendant having, since the commencement of the action, admitted by the latter the possession of assets sufficient to cover the judgment, and also the plaintiff's demand.^f Where an executrix pleaded in assumpsit that she had not, nor at the commencement of the action or since, had any goods which were of the testator at the time of his decease in her hands to be administered; and the plaintiff replied, that the defendant, before and at the time of the commencement of the action and since, had divers goods of the testator to be administered; upon *which issue was joined. At the trial the plaintiff having shown that the defendant received certain assets, the defendant proved payment to a greater amount, and

*1007

^a *Mara v. Quin*, 6 T. R. 5.

^b *Id.* 11. On an issue taken on a plea of *plene administravit*, the amount of probate stamp is not any, even *prima facie*, evidence of the amount of assets come to the hands of the executor. It is, however, admissible evidence on the subject of assets, on the ground of its being a declaration made by the executor at the time of obtaining probate, of his expectations as to the amount of assets. *Mann v. Lang*, 1 Harr. & Woll. 441. 5 Nev. & M. 202.

^c *Jones v. Roberts*, 2 C. & M. 219. 4 Tyr. 48.

^d *Marston v. Downes*, 1 Adol. & Ellis, 31. (28 Eng. C. L. 24.) 3 Nev. & M. 861. 6 C. & P. 381. (25 Eng. C. L. 448.)

^e *Smith v. Day*, 2 Mees. & Wels. 684. ^f *Roberts v. Wood*, 3 Dowl. 797.

a verdict was found in her favor; held, first, that evidence of the payments was properly received; and secondly, that the plaintiff was not entitled to judgment *non obstante veredicto*, upon the ground that the introductory part of the plea did not state that the executrix had fully administered the testator's goods.^a

Where an administrator, being under terms to plead issuably, pleads inconsistent pleas, as *plene administravit*, and his own bankruptcy, the plaintiff may sign judgment as for want of a plea.^b *Plene administravit* is no bar to an action against an executor, upon a covenant by the testator, where the executor has paid over the residue within six months after probate.^c(1)

When the plaintiff has given *prima facie* evidence of assets, the defendant may show under the issue raised on *plene administravit* that those assets have been exhausted by payment, before action brought, of debts of a higher degree or of an inferior degree, without notice.^d If the defendant has paid debts to the amount, after the suing out, but before notice of the plaintiff's writ or debt, he must plead such defence specially; for no payments made after the action commenced can be given in evidence under *plene administravit*.^e Where a bond of the testator's has been paid by the executor in order to avail himself of the payment; under *plene administravit* he must prove the due execution of it by calling the subscribing witness, even though the bond has been destroyed.^f In answer to proof by the plaintiff, that the debt paid by the defendant was not a just one, or that less is due than the sum for which judgment was given, and which is *prima facie* evidence of fraud, the defendant may show that the judgment was entered for more by mistake.^g

^a *Reeves v. Ward*, 1 Hodges, 300. 2 Bing. N. C. 235. (39 Eng. C. L. 316.) 2 Scott, 290.

^b *Serle v. Bradshaw*, 2 C. & M. 148. 4 Tyr. 69.

^c *Davis v. Blackwell*, 9 Bing. 5. (23 Eng. C. L. 243.) 2 Moore & S. 7.

^d B. N. P. 143. See *ante*, 981. ^e Com. Dig. Admin. (C. 2.)

^f *Gillies v. Smither*, 2 Stark. 528. (3 Eng. C. L. 460.)

^g *Pease v. Naylor*, 5 T. R. 80.

(1) (In proof of assets, the plaintiff may give in evidence the inventory of the personal estate of the deceased; and when such evidence is given, it is sufficient to throw the onus on the executor or administrator to show how he disposed of the goods and money specified in the inventory. *Boyd v. Boyd*, 1 Watts, 367. The creditor is not concluded by the appraisalment. *Willoughby v. McClure*, 2 Wend. 609.)

*SECTION XIV.

ADMISSION OF ASSETS.—DEVASTAVIT.

What will amount to an admission of assets.

Evidence of a devastavit.

If an executor suffer judgment by default, or judgment be given against him on demurrer to the declaration, or if he plead payment of a bond and omit to plead *plene administravit*, it will operate as an admission of assets, in an action against him on the judgment suggesting a *devastavit*.^a (1) For it is a universal principle of law, that if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it in another action founded upon it, or in a *scire facias*.^b Therefore, in an action of debt on a judgment suggesting a *devastavit*, it will be sufficient for the plaintiff, under a plea of *non devastavit*, to prove the former judgment, and the return of *nulla bona* to the *feri facias*.^c In an action against executors, if they plead over and the verdict pass against them, the production of the judgment-roll on a *scire fieri* inquiry before the sheriff is sufficient *prima facie* evidence of assets to find a *devastavit*.^d In debt on a judgment recovered by *default* against an executor, the roll of proceedings in the original action showing a return of *nulla bona* by the sheriff to the writ of *fi. fa.* issued to recover the debt *de bonis testatoris*, is sufficient *prima facie* evidence of a *devastavit*.^e Where the defendant pleads *non est factum testatoris*, or a release to the testator, or payment by him, or *non assumpsit*, these pleas admit assets.^f So if an executor or administrator submits to an arbitration, it is an admission of assets, as between the parties to the submission.^g But it is not sufficient to charge an executor with assets, to show that he has acquiesced in the receipt of assets by his co-executor.^h (2) On plea of *plene administravit*, proof of an admis-

^a *Erving v. Peters*, 3 T. R. 685. *Rock v. Leighton*, Salk. 310. 1 Lord Raym. 589. 2 Stark. Ev. 326.

^b *Id.* Per Buller, J., 3 T. R. 689.

^c *Skelton v. Hawling*, 1 Wils. 259. *Erving v. Peters*, 3 T. R. 685.

^d *Palmer v. Waller*, 2 Gale, 105. 1 Mees. & Wels. 689.

^e *Leonard v. Simpson*, 1 Hodges, 251. 2 Bing. N. C. 176. (29 Eng. C. L. 297.)
^f 1 Saund. 336.

^g *Barry v. Rush*, 1 T. R. 691. See *ante*, 991.

^h *Stearn v. Mills*, 4 B. & Ad. 657. (24 Eng. C. L. 133.) 1 N. & M. 434. The inventory exhibited in the Ecclesiastical Court by an executor, for the purpose of obtaining probate, is not generally *prima facie* evidence of having received assets. *Id.* But see *Giles v. Dyson*, 1 Stark. 32. (2 Eng. C. L. 282.) *Hickey v. Hayter*, 6 T. R. 384.

(1) (*Geithner v. Welch's Estate*, 3 Gill & Johns, 259.

On a judgment against an administrator *as such*, the proper goods of the administrator cannot be taken in execution; if assets of the intestate cannot be found, the administrator can be pursued personally only in an action for a devastavit. *Need v. Kilday*, 2 Watts, 110.)

(2) (See *ante* p. 974, note (1).)

sion by the executor that the debt was just, and should be paid as soon as he could, is not evidence to charge him with assets.*

In an action against executors for a debt of the testator, a Legatee. legatee is a good witness for the defendants; for his legal rights under the will cannot be affected by the verdict.^b

*SECTION XV.

*1009

COSTS.

FORMERLY executors or administrators were not liable to costs in case of a nonsuit, or a verdict against them, when they necessarily sued in their representative character, as upon a contract entered into by the deceased in his lifetime;^c though when they *might sue* in their own name, as where the cause of action arose after the death of the testator or intestate, they were not exempt from costs.^d But now by 3 & 4 W. IV, c. 42, s. 31, "in every action brought by an executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the superior courts of law at Westminster, shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff; and in all other cases in which he would be liable, if such plaintiff were suing in his own right, upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner."^e This enactment was held to have a retrospective operation.^f "The general rule now is, that an executor or administrator who has been nonsuited, or who has lost a verdict, is liable to costs; and it is cast upon him to make out that there are particular circumstances in his case which would justify the court in exempting him, by an exercise of their discretionary authority."^g

* Hindsley v. Russell, 12 East, 232.

^b Burghart v. Hall, MS., Coram Lord Abinger, C. B. Sittings after T. T. 1837, rule for a new trial granted.

^c Their exemption was founded not on any express enactment, but on the description of words contained in the statute 23 Hen. VIII, c. 15. Per Lord Eldon, C. J., in Tattersall v. Grote, 2 B. & P. 253. Per Tindal, C. J., 1 Bing. N. C. 302. (27 Eng. C. L. 400.) See Tidd's Prac. 9th Ed. 978.

^d Grimstead v. Shirley, 2 Taunt. 116. Jones v. Jones, 1 Bing. 249. (8 Eng. C. L. 312.) Dowbiggin v. Harrison, 9 B. & C. 666. (17 Eng. C. L. 470.) Jobson v. Forster, 1 B. & Ad. 6. (20 Eng. C. L. 331.) Slater v. Lawson, *id.* 893. (20 Eng. C. L. 504.)

^e 3 & 4 W. IV, c. 42.

^f Freeman v. Moyes, 1 Ad. & Ell. 338. (28 Eng. C. L. 103.) 3 N. & M. 883. Grant v. Kemp, 2 C. & M. 636.

^g Per Tindal, C. J., in Wilkinson v. Edwards, 1 Bing. N. C. 303. (27 Eng. C.

To exempt executor from costs, when there is a verdict
 *1010 *against him, it is not sufficient for him to show that the action was brought *bond fide*, and with a fair chance of succeeding; but some misconduct on the part of the defendant, or some other special cause for exemption must be shown;^a and the conduct of the defendant *after* action brought, relative to the mode of conducting the defence, will not be considered by the court in exercising their discretion.^b Nor is it sufficient to show that the action was brought under legal advice to try a doubtful point of law, which it was necessary to have decided, in order to obtain an equitable administration of the assets in a creditor's suit.^c But where an executor was nonsuited in an action on a policy of insurance effected on the life of the testator, the court ordered judgment to be entered up for the defendant, without costs, it appearing that it was the bounden duty of the executor to bring the action; besides, he was defeated on a ground which he could not be supposed to apprehend.^d The courts have no authority under the above statute to exempt an executor from costs, which, before the act, he would be liable to pay; the express object of that statute being to impose additional liability on executors and administrators.^e Where an executor seeks to be relieved from costs, he should make his application before taxation, otherwise, if granted, it will be only on payment of the costs of the application.^f It is not settled, whether the decision of a single judge respecting such costs is final, or whether it is subject to the review of the court.^g(1)

L. 400.) 1 Scott, 173. Per Lord Denman, C. J., in *Farley v. Bryant*, 1 H. & W. 775. 3 Ad. & Ell. 852. (30 Eng. C. L. 243.) 5 N. & M. 57.

^a *Mouthgate v. Crowley*, 1 Bing. N. C. 518. (27 Eng. C. L. 477.) 1 Hodges, 1. 1 Scott, 374. *Lewis v. Marfelt*, 1 Mur. & Hurl. 5. *Godson v. Freeman*, 1 Gale, 339. 2 C. M. & R. 585. *Vaughan, J., dissentiente*.

^b *Farley v. Bryant*, 1 Har. & W. 775. (30 Eng. C. L. 243.) 3 Ad. & Ell. 852.

^c *Id.*

^d *Lysons v. Barrow*, 10 Bing. 563. (25 Eng. C. L. 244.) 4 M. & Scott. 463.

^e *Ashton v. Poynter*, 1 Gale, 57. 1 C. M. & R. 738. *Spence v. Albert*, 2 Ad. & Ell. 785. (29 Eng. C. L. 212.) 4 N. & M. 385. 1 H. & W. 7.

^f *Ashton v. Poynter*, *supra*.

^g *Maddox v. Phillips*, 3 Ad. & Ell. 198. (30 Eng. C. L. 72.) 1 H. & W. 251. *Lakin v. Massie*, 1 Gale, 270. 4 Dowl. 239.

(1) (The rule upon the subject of costs is thus laid down: Wherever an executor or administrator brings an action *in autre droit*, that is, founded upon a transaction which arose in the lifetime of the testator or intestate and fails, he shall not pay costs, but if for a cause to which he himself was a party, although the fruits of the suit if successful would be assets when recovered, yet if he fails he shall pay the costs out of his own pocket. Per Kennedy, J., in *Potts v. Smith*, 3 Rawle, 377. See *Munterp v. Munterp*, 2 Rawle, 180. *Armstrong's Estate*, 6 Watts, 236. *Healy v. Root*, 11 Pick. 389. *Jenison v. Hapgood*, 14 Pick. 345. *Pierce v. Saxton*, *Id.* 374. *Blaks v. Dennis*, 15 Pick. 385. *Crofton v. Joley*, 6 Grant, 48. *Eames' Adm. v. Creditors*, 4 Verm. 257. 3 Johnson's Digest, 335. 2 Selwyn's N. P. (Ed. of 1831,) p. 31, and note 1.)

SECTION XVI.

JUDGMENT.

WHENEVER the action against an executor or administrator can only be supported against him in that character, and he pleads any plea which admits that he has acted as such, except a release to himself, the judgment against him must be, that the plaintiff do recover the debt and costs to be levied out of the assets of the testator, if the defendant have so much, but if not, then the costs out of the defendant's own goods, otherwise the judgment will be erroneous. As where the defendant pleads *non est factum testatoris*, or a release to the testator, or *non assumpsit*.^a So where he pleads *plene administravit* and it is found against him.^b But where the defendant pleads *ne unques* executor, or a release to *himself*, and it is found against him, the judgment is, that the plaintiff do recover both the debt and costs in the first place, *de bonis testatoris si, &c.*, and *si non, &c., de bonis propriis*, because the executor cannot but know these to be false pleas.^c Upon a plea of *plene administravit* the executor or administrator is liable only to the amount of assets proved to be in his hands, and judgment should be entered up for that amount only.^d If the plaintiff cannot deny the plea of *plene administravit*, he should pray judgment of assets *quando acciderint*, or assets in *futuro* either generally or specially, as, "which after satisfying moneys due on the outstanding judgments, bonds, &c., mentioned in the defendant's plea, shall come into the defendant's hands as executor," &c.^e In *assumpsit* against an executor, he pleaded a retainer and *plene administravit præter*, and the plaintiff, admitting the truth of the pleas, took judgment of assets *quando acciderint*; held, that he was entitled to enter it up for the debt and costs.^f

When the judgment will be *de bonis testatoris et si non de bonis propriis*.

Judgment of assets *quando acciderint*.

*1012

If the plea be *plene administravit præter* a sum which the defendant acknowledges to be in his hands, the plaintiff (if he cannot controvert it) should take judgment *pro tanto*, and of assets *quando acciderint*, as to the residue. If the defendant has pleaded the general issue, or any other plea denying the

^a 1 Saund. 335.

^b *Id.* As to the effect of a mistake in entering judgment *de bonis propriis* instead of *de bonis testatoris, &c.*, see *id.* Short v. Coffin, 5 Burr. 2730. Burroughs v. Stevens, 5 Taunt. 554. (1 Eng. C. L. 186.)

^c 1 Saund. 336, b.

^d 1 Saund. 219, b. 336. Hargthorpe v. Milforth, Cro. Eliz. 319. Harrison v. Becclea, cited, 3 T. R. 683.

^e Com. Dig. Pleador, (2 D. 9.) 2 Saund. 226. Mary Shipley's Case, 8 Co. 134. 1 Ch. Pl. 589.

^f Cox v. Peacock, 1 Hodges, 273. 2 Scott, 125. De Tastett v. Andrade, 1 Ch. 629. (18 Eng. C. L. 185.)

debt or cause of action, with the plea of *plene administravit* the plaintiff must proceed to trial to establish his debt, and on the prayer of judgment of *assets quando*, &c., upon the plea of *plene administravit*, there is a stay of judgment until the determination of the issue. But where the debt has not been denied, and the defendant has merely pleaded *plene administravit*, and the plaintiff prays judgment *quando*, &c., there should be an entry of that judgment immediately.^a This is an interlocutory or final judgment, according to the nature of the action; and if it be only interlocutory, there must be a writ of enquiry to ascertain the amount of the plaintiff's demand.^b By taking a judgment of assets *quando*, the plaintiff admits that the defendant has fully administered to that time.^c If the plaintiff takes issue on the plea of *plene administravit*, and it be found against him, he cannot have judgment of assets *quando*.^d

SECTION XVII.

ADMINISTRATION BOND.

THE statute 21 Hen. VIII, c. 5, s. 3, directs the ordinary to grant administration, "taking surety of him or them, to whom shall be made such commission;" and the statute 22 & 23 Car. II, c. 10, s. 1, further provides, "that all ordinaries, ecclesiastical judges, &c., shall, upon granting administration, take sufficient bonds, with two or more sureties, of the persons appointed administrators, in the name of the ordinary, with condition *that such administrators shall make a true inventory of the goods and chattels of the deceased; and shall well and truly administer such goods and chattels according to law, and cause a true and just account of the said administration, &c., to be made, and shall deliver and pay unto such person or persons respectively, as the judge of the court in which administration was granted, by his decree or sentence shall appoint, all the rest and residue of such goods and chattels as shall be found remaining on the said administrator's account, the same being first examined and allowed by the said judge," &c.

Action on the bond. If the bond given to the ordinary under this statute has been forfeited, the parties desirous of enforcing it against the sureties, must apply to the ecclesiastical court to pronounce it forfeited, in order to its being put in suit. It seems that the next

^a 1 Ch. Pl. 589.

^b Tidd, 683. If the action be in debt, the judgment is final in the first instance.

^c 2 Saund. 219, a.

^d 2 Saund. 217.

of kin or a creditor may sue on such bond in the name of the ordinary, and the Court of King's Bench will direct the ordinary to permit his name to be used, in an action thereon, on the application of a party properly entitled.^a It may be assigned as a breach in an action on a bond, that the administrator has not delivered a true and perfect inventory,^b or that he has not made a true and just account;^c and either of these breaches will be incurred without any citation.^d But it is no breach of the conditions of such bond "to refuse to distribute among the next of kin, the surplus of the intestate's estate, after payment of debts," &c., without the previous decree of the court directing the administrator to do so.^e Nor is it a ground of forfeiture that the administrator has not paid the debts of the intestate.^f Where an administrator converted assets of the intestate to his own use, and became a bankrupt before he had exhibited his inventory, or made his account, and the ecclesiastical court discharged him from the suit there, he having received his certificate as a bankrupt; the court of Exchequer held, that his "malfeasance in converting to his own use the intestate's assets was a breach of the clause of the condition "well and truly to administer" them, and that the sureties were liable for the amount of the assets misapplied.^g It is not a sufficient answer to the assignment of the breach for not exhibiting an inventory on a certain day, "that there was no court on that day." The defendant must also plead that he was ready, &c.; for he must show that he had done all that could be done on his side towards a perfect performance;^h and such a defence must be specially pleaded.ⁱ Where the creditors of the intestate brought an action against the sureties, on the administration bond, without the permission of the archbishop, and upon *oyer* craved the Ecclesiastical Court refused to give the bond to the plaintiffs; the court of Common Pleas refused an application that an authenticated copy of the bond, or the production of the bond itself in the Ecclesiastical Court to the attorney of the defendants should be a sufficient *oyer*; as the granting of such an application would deprive the Ecclesiastical Court of its jurisdiction, on deciding whether the action should be brought or not, or of insisting on an indemnity.^j

*1014

^a Archbishop of Canterbury v. House, Cowp. 141. Greenside v. Benson, 3 Atk. 248.

^b Greenside v. Benson, *supra*.

^c Archbishop of Canterbury v. Willis, 1 Salk. 316. S. P. 1 Lutw. 682.

^d 1 Salk. 315.

^e Canterbury (Archbishop of) v. Tappen, 8 B. & C. 151. (15 Eng. C. L. 174.)

^f 1 Salk. 316.

^g Canterbury (Archbishop of) v. Robertson, 1 C. & M. 691. 3 Tyr. 390.

^h Canterbury (Archbishop of) v. Willis, 1 Salk. 172.

ⁱ Canterbury (Archbishop of) v. Robertson, *supra*.

^j Canterbury (Archbishop of) v. Tubb, MSS. C. P. E. T. 1837.

*CHAPTER XIII.

THE STATUTE AGAINST FRAUDS.

	PAGE
I. Observations on the statute 29 Car. II, c. 3, . . .	1016
II. Sec. 1 & 2. Leases.	1019
III. Sec. 3. Assignment or surrender of title.	1021
IV. Sec. 4.	1022
V. Promise by executor or administrator, &c.	1023
VI. Promise to answer for the debt of another.	1031
VII. Statement of the consideration.	1038
VIII. Agreement in consideration of marriage.	1039
IX. Contracts for the sale of lands.	1044
X. Agreements not to be performed within a year.	1046
XI. Memorandum or note in writing.	1050
XII. Agent.	1050
XIII. 29 Car. II, c. 3, sec. 17. & 9 G. IV, c. 14, s. 7.	1051
XIV. Of contracts for the sale of goods.	1054
XV. Delivery and acceptance.	1059
XVI. Earnest.	1059
XVII. Note or memorandum.	1062
XVIII. Agent.	1065
XIX. Pleadings.	1065

SECTION I.

OBSERVATIONS ON THE STATUTE 29 CAR. II, C. 3.

THIS celebrated statute, the provisions of which have been the theme of much commendation,^a is said to have been the joint *production of Sir Mathew Hale,^b Lord Nottingham,^c Sir Leoline Jenkies,^d and the Lord Keeper Guilford.^e The

^a Lord Nottingham used to say of this statute, that "every line of it was worth a subsidy." *Lord Keeper Guilford's Life*, by R. North, p. 108. In *Chaplin v. Rogers*, 1 East, 194, Lord Kenyon said that "it is one of the wisest laws in our statute book." See also *Chater v. Becket*, 7 T. R. 204. Roberts on the Statute of Frauds, Preface xix. Evans's Statutes, Part II. Chitty's Statutes, 366.

^b This statute is said to have been drawn by Lord Hale, per Lord Ellenborough, C. J., in *Wain v. Warter*, 5 East, 17. But in *Wyndham v. Chetwynd*, 1 Burr. 418, Lord Mansfield, expressed a doubt of this. And in Ruffhead's Edition of the Statutes, it is said, that it is scarcely probable that Lord Hale drew it, because the statute was not passed until after his death in 1676.

^c See *Ash v. Abdy*, 3 Swans. 664.

^d See Wynn's Life of Sir Leol. Jenkins, Vol. I. p. 3.

^e The Lord Keeper Guilford had also a great share in penning this statute, as well as Sir Matthew Hale, 1 Ch. Stat. 366. The language and composition of the act have certainly no claim to particular commendation. Next to those acts relating to the settlement of the poor, it has been productive of more litigation in settling its construction, than any in the whole range of the statutes. It was stated by Mr. Barrington, forty years ago, to be a common notion in Westminster Hall, that it had not been explained at a less expense than 100,000*l.* *Id.*

object of it is, the prevention of perjury, by requiring evidence in writing of the various contracts therein mentioned. It does not in any degree affect the nature of the contract, or dispense with any evidence of consideration which was previously required.

It would be inconsistent with the object of this treatise to discuss the different clauses of this statute. Little more, therefore, is proposed, than to refer briefly to those provisions of the statute, and the various decisions thereon, which fall within the design of this work.

SECTION II.

SECTIONS 1 AND 2—LEASES.

By sect. 1, for the prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury, it is enacted, "that all leases, estates, interests of freehold, or term of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the *parties so making or creating the same, or their agents, thereunto lawfully authorised by *writing*, shall have the force and effect of leases, or estates only at *will*, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases, or estates, to the contrary notwithstanding."

Sect. 2, excepts from the operation of the preceding enactment, "all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts, at the least, of the full improved value of the thing demised."

It has been held, that a parol agreement respecting an easement in the land of another, is not within the meaning of the first section; as where the defendant agreed, *by parol*, that the plaintiff should have the liberty of stacking coals upon a close belonging to him for seven years, and that during that period the plaintiff should have the sole use of that part of the close; held, that the agreement was binding, for as it was for an easement only, and not for an interest in land, it did not amount to a lease.⁽¹⁾ The purchase of a standing crop of growing grass

* Wood v. Lake, Say, 3. Webb v. Paternoster, Palm. 71. But in Hewlins v. Shipham, 5 B. & C. 291, (11 Eng. C. L. 207,) it was decided that a freehold easement in

(1) A right of way can be passed by deed only, and not by parol. *Collins v. Hocker*, 1 Rawl. 106. It may be questionable whether a parol license to overflow land by the erection

Crop of grass. is not within the first section; for construing the first section by the second, it meant to vacate parol leases conveying a greater interest in land than for a term of three years, and upon which a rent is reserved.^a

A lease for more than three years will enure as a tenancy from year to year. Though the statute says that interest of freehold, or terms for years created by parol, shall have the force and effect of leases, or estates at will only, yet it has been held that a lease by parol, though for more than three years, will enure as a tenancy from year to year; (1) the yearly tenancy commencing on the same day with the parol lease, and that it will require a regular notice to determine the interest, as in other similar holdings.^b Where there was a parol agreement for a lease for seven years, the tenant to enter at Lady day and quit at Candlemas; it was held, that the landlord could not eject him, except at Candlemas, for though by the statute the lease was void as to the period of its duration, yet it would regulate the terms on which the tenancy subsisted in other respects.^c

*1018

From what day a parol lease is to be computed.

A verbal lease for two or three years is good.

Agreement for a future lease.

A lease for three years, to be valid without writing, must be computed from the day of the agreement, and not from a future day.^d But a lease by parol, to commence at a future day, for less than three years from the time of making it, is good.^e Thus a lease by parol for a year and an half, to commence after the expiration of a lease which wants a year of expiring, is good, for it does not exceed three years from the making.^f A verbal agreement to take ready furnished lodgings for two or three years is valid as a lease for not exceeding three years.^g A letting, without reference to time, creates a strict tenancy at will.^h

Where a party enters under a mere agreement for a future lease, he is a tenant at will only; if he pay a yearly rent he becomes a tenant from year to year, such tenancy being determinable on the execution of the lease according to the agree-

the land of another, could not be created without deed; and the court said in reference to the above cases, that the objection that the right lay in grant, and therefore could not pass, was not taken. See also *Fentiman v. Smith*, 4 East, 107. *Harrison v. Parker*, 6 East, 154. In the former case, it was held that a title to have water flow in a tunnel over the plaintiff's land, could not pass by parol licence without deed.

^a *Crosby v. Wadsworth*, 6 East, 602. But it is within the 4th section. *Id.*

^b *Clayton v. Blakey*, 8 T. R. 3.

^c *Doe v. Bell*, 5 T. R. 471.

^d *Rawlins v. Turner*, 1 Ld. Raym, 736.

^e *Ryley v. Hicks*, 1 Stra. 651.

^f *B. N. P.* 173.

^g *Edge v. Stafford*, 1 C. & J. 391.

^h *Richardson v. Langridge*, 4 Taunt. 128.

of a dam is within the statute of frauds. Per *Kennedy J.* in *M'Kellin v. M'Ilhenny*, 4 Watts, 322.

All the cases agree that a permanent interest in the land itself can be transferred only by writing. A license is an authority to enter upon the lands of another and do a particular act or series of acts, without possessing any interest in the lands; it is founded in personal confidence; is not assignable, and is valid, though not in writing, but the conferring of a right to enter upon lands and to erect and maintain a dam as long as there shall be employment for the water power thus erected is more than a license; it is the transfer of an interest in lands, and to be valid must be in writing. *Mumford v. Whitney*, 15 Wend. 380. See *Noyes v. Chapin*, 6 Wend. 461.)

(2) (*M'Donell v. Simpson*, 3 Watts, 129.)

ment. And though no rent be paid, the relation of landlord and tenant subsists, the party having entered with a view to a lease, and not with a view to a purchase.*

An indorsement on the draft of a lease, signed by the lessee, and requesting the lessor to let the premises to some other person, as it would be inconvenient for him, the lessee, to perform his agreement respecting them, was held sufficient to satisfy the statute, for it was a writing under his hand expressing that he had entered into the agreement, and it was not necessary *that it should be cotemporaneous with the agreement, if it was adopted by him at any time.*

Indorsement on the draft of a lease, when sufficient.

*1019

SECTION III.

ASSIGNMENT OR SURRENDER OF TITLE.

By sect. 3, "no leases, estates or interests, either of freehold or term of years, or any uncertain interest, not being copyhold or customary *interest*, of, in, to, or out of, any messuages, manors, lands, tenements, or *hereditaments*, shall be *assigned*, *granted*, or *surrendered*, unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorised by *writing*, or by act and operation of law."

Assignment or surrender of interest in land to be in writing.

It has been held, that the assignment of a parol lease from year to year was void, under this section, unless made in writing;* and that a *parol* agreement between the landlord and tenant, to determine such tenancy in the middle of the quarter was not binding, or a sufficient surrender of the tenancy, though the tenant did quit according to the agreement.⁴ But if *both parties act* on such notice, that is, if the tenant quit, and the landlord takes possession, it operates as a determination of the tenancy.*

Parol lease from year to year.

The mere cancelling a lease is not a sufficient surrender of the term thereby created.⁽¹⁾ But where a mortgagee wrote on the mortgage-deed, "received of *A. B.* for principal and interest, and I do release and discharge the within premises from

What is a sufficient surrender.

* 2 Stark. Ev. 342. See *ante*, 858, *et seq.*

⁴ Shippey v. Derrison, 5 Esp. 190.

⁴ Botting v. Martin, 1 Camp. 190.

⁴ Mollett v. Brayne, 2 Camp. 103. Thomson v. Wilson, 2 Stark. 379. (3 Eng. C. L. 391.) Johnstone v. Huddleston, 4 B. & C. 922. (10 Eng. C. L. 471.)

⁴ Whitehead v. Clifford, 5 Taunt. 518. (1 Eng. C. L. 173.) Grimman v. Legge, 8 B. & C. 324. (15 Eng. C. L. 229.)

¹ Ros v. The Archbishop of York, 6 East, 86. Doe v. Thomas, 9 B. & C. 299. (17 Eng. C. L. 380.) Wootley v. Gregory, 2 Y. & J. 536.

(1) (Rowan v. Lytle, 11 Wend. 616. Schieffelin v. Carpenter, 15 Wend. 400.)

the term of 500 years;" it was held to be a sufficient surrender; for, at common law, a lease by deed might be surrendered by parol, and the statute only required that the surrender should be in writing.^a

- *1020 *The taking a new lease by parol, to commence during the existence of a former demise, operates as a surrender of the old one.^b If a lessee for years accept a new lease by parol, when the first lease was by indenture, it operates as a surrender in law.^c A verbal agreement to lease a ferry for a year may be put an end to by a verbal agreement before the expiration of the year.^d A mere agreement for an increase of rent in the middle of the year creates a new tenancy.^e Where *A.*, by parol, let a house to *B.*, who under-let it to *C.*, and then *A.*, with *B.*'s assent, accepted *C.* as his tenant, and received rent from him, it was held to be a surrender by operation of law.^f

Substitution of one tenant for another.

There are many cases in which it has been decided, that where one tenant is substituted for another by the consent of all the parties, it operates as a surrender in law.^g But there must be a clear substitution, and acceptance by the landlord of the new tenant, and merger of the old tenant's interest; and though taking rent from the new occupier is evidence of these facts, it is not conclusive.^h

A., the tenant of a house, three cottages, and a stable and yard, let at an entire rent, for a term of seven years, before the expiration of the term, assigned all the premises to *B.* for the remainder of the term, the house and cottages being in the possession of under-tenants, and the stable and yard in that of *A.*; the landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of the quarter. *B.* took possession of the yard and stable only; the occupiers of the cottages having left them after the assignment, and before the expiration of the term, the landlord re-let them; *A.* paid no rent after the assignment, but the landlord received rent from the under-tenants; before the expiration of the term, the landlord advertised the whole of the premises to be let or sold: held, that this was a surrender by operation of law of all the premises.ⁱ So where the plaintiff was tenant to *A.* of one close; *K.* was tenant to *B.* of another close; the plaintiff and *K.* verbally agreed to exchange their holdings; "the plain-

^a *Farmer v. Rogers*, 2 Wils. 26.

^b *Hamerton v. Stead*, 3 B. & C. 478. (10 Eng. C. L. 159.) See *Whitcher v. Hall*, 5 B. & C. 269. (11 Eng. C. L. 224.)

^c *Com. Dig. Surrender*, 1. See 1 Saund. 236, b.

^d *Peter v. Kendal*, 6 B. & C. 703. (13 Eng. C. L. 301.)

^e *Doe v. Kendrick*, Ad. Eject. 129.

^f *Thomas v. Cooke*, 2 B. & A. 119. 2 Stark. 408. (3 Eng. C. L. 405.)

^g See *Walls v. Atcheson*, 3 Bing. 462. (13 Eng. C. L. 52.) *Mathews v. Sewell*, 8 Taunt. 270. (4 Eng. C. L. 101.) *Stone v. Whiting*, 2 Stark. 235. (3 Eng. C. L. 331.) *Phipps v. Sculthorpe*, 1 B. & A. 50.

^h *Graham v. Whichelo*, 1 C. & M. 189.

ⁱ *Reeve v. Bird*, 1 C. M. & R. 31. 4 Tyr. 612.

tiff to have *B.*'s land, and pay *K.*'s rent; *K.* to have *A.*'s land and pay plaintiff's rent." On the same day each took possession of the other's land. *K.* undertook to communicate their bargain to *C.*, who was the agent of both *A.* and *B.*; he did accordingly, some days afterwards, communicate it to him, and *C.* expressed his concurrence; held, that this was evidence to go to the jury of a surrender by *K.* to *B.* of his interest in *B.*'s close.^a *A.* demises to *B.* who under-lets to *C.* In the middle of both terms it is agreed between *A.* and *B.*, that *B.*'s tenancy shall cease, and between *A.* and *C.*, that *C.* shall hold under *A.* for a longer term; this arrangement enures as a surrender from *B.* to *A.*, and a new demise from *A.* to *C.*^b

But where a yearly tenant agreed, by parol, with his landlord to quit, without giving due notice, and the premises were re-let by auction, at which the tenant attended and bid, but the new tenant was not let into possession, as the old tenant refused to quit; held, that it did not amount to a surrender by operation of law.^c Unless there be a written demise to the new tenant, or he takes possession, there is no surrender of the prior tenancy.^d

SECTION IV.

SEC. 4. enacts "that no action shall be brought whereby to charge any *executor* or *administrator* upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any *special promise* to answer for the debt, default, ^{*1022} or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

^a *Bees v. Williams*, 2 C. M. & R. 581. 1 Tyr & G. 23. 1 Gale, 332.

^b *Rex v. Banbury*, 3 Nev. & M. 292. 1 Adol. & Ellis, 136. (28 Eng. C. L. 57.)

^c *Huddleston v. Johnson*, 1 M'Clel. & Y. 141.

^d *Taylor v. Chapman*, Peake Add. 19.

SECTION V.

PROMISE BY AN EXECUTOR.

A promise by an executor or administrator to pay the debt of the deceased, to render him personally liable, must be in writing. Consideration for the promise.

A PROMISE, to render an executor or administrator personally liable for the debt of the testator or intestate, must be in writing, and signed by him; and if there be no assets, such promise, even though reduced into writing, is but *nudum pactum*, unless it be founded on a sufficient consideration. The *common law* requires that there should be a sufficient consideration to support the promise, and the statute adds a little further requisite, namely, that the promise should be in writing.^a (1)

The leading case on this subject is *Rann v. Hughes*, which was an action of assumpsit against an administratrix, on a promise made by her to pay the debt of the intestate, after verdict for the plaintiff, upon which judgment was entered against the defendant, *de bonis propriis*, which was reversed in the Exchequer chamber; and on a writ of error in the House of Lords, the judges having been consulted, gave their unanimous opinion that the defendant was not liable; as there was no sufficient consideration to support the demand against her in her personal capacity, for she derived no advantage or convenience from the promise which she made, it being a promise generally to pay upon request what she was liable to pay upon request in another right; and though the *promise was reduced into writing, (which might be presumed after verdict,) yet that did not obviate the objection of *nudum pactum*; for by the law of England all contracts which are merely written, and not specialties, require a consideration to support them, and the statute of frauds did not take away the necessity of a consideration in this case; the statute was made for the relief of personal representatives, and others, and did not intend to draw them further than by the common law they were chargeable.^b

*1023

SECTION VI.

PROMISE TO ANSWER FOR THE DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER.

A collateral en-

A PROMISE to pay the debt of another, on a demand for which another is liable, is not binding unless it be in writing; (2)

^a Saund. 211.

^b *Rann v. Hughes*, 7 T. R. 350. n.

(1) (*Harrington v. Rich*, 6 Vermont, 666.)

(2) (The mischief produced by the want of a provision in our act of assembly, similar

but to bring a case within the statute, and render the promise void for want of writing, there must be a debt or legal liability on the part of the third party, and the defendant's engagement must be collateral; for if credit be given to the defendant *only* and the third party be not at all trusted, the statute does not apply.

Where the plaintiff was induced to send goods to another in consequence of the defendant's saying, "if you do not know him you know me, and I will see you paid;" held a collateral promise, and therefore void, not being in writing.⁽¹⁾ So where the defendant undertook that if the plaintiff would lend his horse to *J. S.*, the latter would re-deliver it.^b So where the defendant said, "I will pay you if *J. S.* will not," and the goods were *afterwards* delivered.^c So, where the defendant said, "you may send the goods to *A.*, and I will take care that the money shall be paid at the time," and it appeared that the plaintiff had sent a bill of parcels to *A.*, charging him as the debtor, and had written a letter to the defendant terming the promise a guarantee; held to be within the statute.^d *1024

So a promise by the indorser of an unpaid note to indemnify the holder, if he will proceed to enforce payment against the other parties, is within the statute.⁽²⁾ Where the plaintiff supplied clothes to the crew of a ship, on a promise made by the lieutenant (the defendant) "to see him paid at pay-table;" held a collateral engagement, for from the nature of the case, the probability was that the plaintiff relied on the power of the defendant over the fund out of which the men's wages were to be paid, and gave credit to that fund rather than to the defendant.^f

Where the defendant in consideration that the plaintiff would discharge out of custody a person taken on a *ca. sa.* at the suit of the plaintiff, promised to pay the debt on a certain day, or render that person; held that the promise was not within the statute, for the plaintiff's consent to discharge the debtor out of custody operated as an extinguishment of the debt; the promise therefore by the defendant was not a collateral, but an original promise, the consideration for which was the discharge of the debt.^g So where plaintiff at the defendant's request

^a *Matson v. Wharam*, 2 T. R. 80.

^b *Buckmyre v. Darnall*, 2 Lord Raym. 1085. Salk. 27.

^c *Jones v. Cooper*, Cowp. 227.

^d *Rains v. Storry*, 3 C. & P. 130. (14 Eng. C. L. 238.)

^e *Winckworth v. Mills*, 2 Esp. 484. ^f *Keate v. Temple*, 1 B. & P. 158.

^g *Goodman v. Chase*, 1 B. & A. 297.

to that in the statute of frauds, by which a *parol* promise to pay the debt of another is void, has induced the courts to lean against a recovery wherever the precise terms of the promise are not explicitly shown by clear and satisfactory proof. Per Gibson, C. J., in *Sidwell v. Evans*, 1 Penn. R. 385.)

(1) (*Skinner v. Conant*, 2 Vermont, 453.)

(2) (A promise by one to indemnify another for becoming a guarantor for a third person is not within the statute. *Chapin v. Merrill*, 4 Wend. 657.)

Promise to pay the debt of an infant, need not be in writing. advanced some money to pay workmen who had been employed in the garden of an infant, it was held the undertaking of the defendant was not within the statute, for it was not a collateral, but an original promise, as the infant could not be liable for the debt.^a A promise by the defendant to execute a bail bond on a writ to be sued out against *A.*, in consideration of the plaintiff forbearing to arrest *A.*, on a writ already sued out, is not a promise to answer for the debt of another and need not be in writing.^b

Agreement to pay the debt of another. Where the defendant in a chancery suit with the consent of the plaintiff, undertook to pay the plaintiff's solicitor his bill of costs, in consideration of the suit being discontinued held, that as the plaintiff, not being released by his attorney, had still continued to be liable for the bill of costs, this was an agreement by the defendant to pay the debt of another within sec. 4, of the statute of frauds, and ought to have been in writing.^c

If the third party be not a debtor, the promise need not be in writing. *1025 So where the plaintiff brought an action of assault against a third party, and the defendant, in consideration that the plaintiff *would withdraw the record and not proceed to trial, promised to pay him 50*l.* and the costs of the suit; held not to be within the statute, and that the defendant was liable, though the promise was not in writing; for the third party was not a debtor, the cause was not tried, and he did not appear to be guilty of any default or miscarriage; there might have been a verdict for him, if the cause had been tried; it was an original promise founded on a new consideration.^d But where *A.* had ridden the plaintiff's horse without his leave, and thereby caused his death, it was held, that a promise by the defendant to pay the plaintiff the damage which he had sustained in consideration of the plaintiff forbearing to sue *A.* was void, not being in writing. "The case of *Read v. Nash*," said Abbott, C. J., "is very distinguishable from this; for there it did not appear that the defendant had ever committed the assault, or that he had ever been liable in damages, and the case was expressly decided on the ground that it was an original, and not a collateral promise. But the wrongful riding the horse of another without his leave and license, and thereby causing his death, is clearly an act for which the party is responsible in damages, and therefore falls within the meaning of the word 'miscarriage.'"^e

^a *Harris v. Huntbach*, 1 Burr. 373.

^b *Jarmin v. Algar*, 2 C. & P. 249. (12 Eng. C. L. 114.) R. & M. 348.

^c *Tomlinson v. Gell*, 1 W. W. & Dav. 239. 1 Nev. & Perr. 558.

^d *Read v. Nash*, 1 Wills. 305.

^e *Kirkham v. Marter*, 2 B. & A. 613. See a very able comment on these cases in 1 Saund. 211. b. 5th Ed., wherein it is contended that *Read v. Nash* has been overruled by *Kirkham v. Marter*. It is stated in 2 Stark. Ev. 344, that *Read v. Nash* was on a demurrer to a declaration which did not allege that any assault had been committed; and *Wilmot, J.*, observed in 3 Burr. 1890, that the defendant was himself originally liable, and that it was not a promise to pay the debt of another. However

If credit be given to the defendant only, and a third party be not at all responsible, the statute does not apply, and the defendant is liable on a parol undertaking, even though the debt of another be the subject matter thereof.

As where *A.* undertook to complete certain work in the defendant's house, but was unable to procure timber, whereupon the plaintiff supplied the timber on the defendant's undertaking "to pay him out of the money which he had to pay *A.*, provided the work was completed;" held not to be a collateral, but an original undertaking, and that the defendant was liable though his promise was not in writing.^a(1)

Where credit is given to the defendant solely, the statute does not apply.
*1026

Where the vendor refuses to deliver goods on the credit of the vendee, and a stranger undertakes *absolutely* to pay the amount, the promise need not be in writing; for it is in effect a sale to the stranger as principal.^b An undertaking that if the plaintiff would discharge *A.* out of custody, the defendant would pay the debt *at all events*, need not be in writing;⁽²⁾ but an undertaking that if plaintiff would discharge *A.*, and take his bill for the debt, defendant without indorsing it would pay in case *A.* dishonored it, must be in writing.^c So where the defendant engaged to "pay for all the gas which might be consumed in the minor theatre, &c., during the time it is occupied by *A. B.*," it was held to be an original, and not a collateral undertaking.^d

It is a question for the jury, in such cases, whether credit was given to the defendant before the debt was incurred, or to another as the principal, taking all the circumstances of the case into consideration. If it appears that the plaintiff originally debited the third person in his books, and not the defendant, it is strong but not conclusive evidence that the defendant was given surety only.^e

It is a question for the jury, to whom credit was given.

A. introduced *B.* to *C.*, an upholsterer, and *A.* in *B.*'s premises, asked *C.* if he had any objection to supply *B.* with some furniture, and that if he would, he would be answerable;

difficult it may be to reconcile these decisions, with reference to the particular facts of each case, yet the general distinction between an original and a collateral undertaking was admitted in both.

^a *Dixon v. Hatfield*, 2 Bing. 439. (9 Eng. C. L. 471.) *Andrews v. Smith*, 2 C. M. & R. 627. 1 Gale, 335. But where *A.* having commenced certain business for *B.*, which he had undertaken, and refused to proceed without a promise from *C.* to pay the further expenses: Held, that *C.* was not liable on such promise, without a note in writing. *Barber v. Fox*, 1 Stark. 270. (9 Eng. C. L. 386.)

^b *Croft v. Smallwood*, Esp. 121. *Browning v. Stallard*, 5 Taunt. 450. (1 Eng. C. L. 154.) *Edge v. Frost*, 4 D. & R. 243. (16 Eng. C. L. 199.) 1 Saund. 211.

^c *Maggs v. Amos*, 4 Bing. 474. (15 Eng. C. L. 45.) 1 M. & P. 294.

^d *Wood v. Benson*, 2 C. & J. 94.

^e 2 Stark. Ev. 345. *Keate v. Temple*, 1 B. & P. 158. *Darnell v. Tratt*, 2 C. & P. 82. (12 Eng. C. L. 36.)

(1) (*King v. Despard*, 5 Wend. 277. *Twome v. Grover*, 9 Pick. 306.)

(2) (A promise to pay the debt of a third person, in consideration of the promisee surrendering property levied upon by execution, is an original undertaking, and need not be in writing to render it valid. *Mercier v. Andrews*, 10 Wend. 461.)

*1027 *C.* asked *A.* how long credit he wanted, and *A.* replied, "he would see it paid at the end of six months;" *C.* agreed to it, and *A.* gave him the order, and the goods were supplied accordingly; *at the end of six months, *B.* not having paid the amount, *C.* applied to *A.* for payment, and he paid the money; the entry in *C.*'s book was *Mr. B., per Mr. A.*; held that "the jury were warranted in finding that the undertaking on the part of *A.* was not collateral."^a

A. is indebted to *B.*, and *C.*, who resides abroad, is indebted to *A.*; *A.* proposes to assign to *B.* the debt owing from *C.* to him, which *B.* agrees to accept; *A.* writes to *C.*'s agents in this country as follows: "As soon as you have funds belonging to *C.* pay on my account to *B.* 291*l.* 19*s.*, and I will credit *C.*, having received his order to this effect." *C.*'s agents verbally promise *B.* to pay him, as they have funds of *C.* in hand; *A.* afterwards orders *C.* to pay to another creditor the debt owing from *C.* to *A.*, and *C.* gives an undertaking to pay that creditor, with a memorandum stating, that as it was alleged that a payment had been made by some person to *A.* on account of *C.*, it was declared that should *C.* prove such payment to have been made, the amount should be deducted; *C.* having refused to pay the debt to this latter creditor, on the ground that the agents were liable to pay it to *B.*; held, that *C.*'s promise to pay was not a promise to pay the debt of a third person, but his own debt, and therefore not within the statute.^b

Where *A.*, being indebted to *B.* and Co. for goods sold, and upon being released from his liability, assigned to the latter a debt which was due to him from *C.* and Co.; and notice of the assignment was given to a partner in the house of *C.* and Co., who, by parol, promised in the name of the firm to pay the debt to *B.* and Co. out of the partnership funds; held, in an action by *B.* and Co. against *C.* and Co. for money had and received, that the promise was not within the statute.^c(1)

*1028 A promise to pay a debt for which another is liable, founded on a consideration distinct from the demand which the plaintiff had against such other person, is not within the statute, though its performance would have the effect of discharging that demand. Where *A.* being insolvent, a verbal agreement was entered *into between several of his creditors and *B.*, whereby *B.* agreed to pay the creditors 10*s.* in the pound in satisfaction

^a *Simpson v. Penton*, 2 C. & M. 430. *Darnell v. Tratt*, 2 C. & P. 82. (12 Eng. C. L. 36.)

^b *Hodgson v. Anderson*, 3 B. & C. 842. (10 Eng. C. L. 247.) 5 D. & R. 735.

^c *Lacy v. McNeile*, 4 D. & R. 7. (16 Eng. C. L. 185.)

(1) (Where *A.* in consideration of property transferred and delivered to him by *B.* promises to pay and discharge amongst other creditors of *B.* named and specified at the time, the demand or claim of *C.* against *B.* on certain notes held by him, an action will lie by *C.* against *A.*, although the promise of *A.* is not reduced to writing. *Ellwood v. Monk*, 5 Wend. 235.)

of their debts, which they agreed to accept, and to assign their debts to *B.*; held, that this was not a *collateral* undertaking, but an *original* contract to purchase the debt.^a

Where the defendant sent the carriages of a third person to the plaintiff to be repaired, and after they were repaired they were delivered according to the defendant's order, and on his promising to pay for the repairs, but the bill was headed by the plaintiff to the third person. Lord Eldon, C. J., held that the case was not within the statute, because the plaintiff had a lien on the carriages, with which he had parted at the defendant's request.^b

So where the plaintiff, a broker, having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of those acceptances as they became due, upon the plaintiff's giving up to him such policies in order that he might collect for the principal the money due thereon from the underwriters, which was accordingly done, and the money was afterwards received by the defendant; held not to be within the statute.^c

So, where the plaintiff, having goods in his possession under an absolute bill of sale, forebore to sell them, on the defendant's *undertaking to pay the debt; held not to be within the statute, *1029 and that the defendant was liable, though his undertaking was not in writing.^d

Where a broker, being employed to sell the goods of an insolvent for the benefit of his creditors, gave a parol promise to pay the rent in arrear to the landlord, if he refrained from distraining, which he threatened to do; held not to be within the statute, for, as the landlord might have immediately enforced the distress, he had a lien on the goods, the parting with which was a good consideration. Le Blanc, J., said, "this is a case where a man having a fund in his hands which was adequate to the discharge of certain incumbrances; another party under-

^a *Anstey v. Marden*, 1 N. R. 124. Where the plaintiff, an occupier of land, resisted a suit by the vicar for tithes, at the request of the defendant, who promised to him the costs which he should thereby incur: Held, that such promise was not within the statute. *Adams v. Dansey*, 6 Bing. 506. (19 Eng. C. L. 149.)

^b *Houlditch v. Milne*, 3 Esp. 86. See 1 Saund. 211, c. 5 Ed.; where the learned editors contend, that the relinquishment of the lien, at the defendant's request, was not the true ground of the defendant's liability; but that credit had been given to him only, and that the real owner of the carriages was not at all liable.

^c *Castling v. Aubert*, 2 East, 325. The principle of this and similar cases seems to be very clear; the plaintiff had a right to retain the policies, and if the defendant had personally undertaken to pay him a sum of money in consideration of his giving up the policies, the doing so, being a relinquishment of an advantage by the plaintiff, would have been a good consideration to enforce the payment of the money. 2 Stark. Ev. 346. In 1 Saund. 211, c. 5th Ed., it is observed that the cases of *Castling v. Aubert*, and *Anstey v. Marden*, *supra*, were decided not to be within the statute, on the ground that there was in both cases, a purchase of an interest, not a mere undertaking to pay the debt of another.

^d *Barrell v. Trussell*, 4 Taunt. 117.

took that if that were delivered up to him, he would take it with the incumbrances. This, therefore, has no relation to the statute of frauds." Ashton, J., considered the goods as the debtor, and therefore that the promise was not to pay the debt of another, but the debt for which the goods were liable, of which goods the defendant was the owner.^a So, where the plaintiff having distrained the goods of his tenant for rent arrear, delivered them to the defendants to be sold, on their undertaking to pay him the rent for which the distress was made; held, on the authority of the preceding case, not to be a promise to pay the debt of another; for after the plaintiff had distrained, the tenant was no longer indebted; consequently, when the promise was made, there was no debt owing from the tenant. The undertaking of the defendants, therefore, was an original and not a collateral undertaking.^b

Where the defendant, an auctioneer, being about to sell goods on premises, the landlord of which applied for rent which was in arrear, saying it was better to apply than to distrain; and *1030 "the defendant said, "you shall be paid, my clerk shall bring you the money;" held, not within the statute.* Where the defendant in consideration for rent undertook to pay the sum due for rent, out of the sale of the produce of the effects; held a positive engagement to pay if the goods were sufficient, and that the plaintiff was entitled to recover, on proof that the goods produced the amount of the rent.^c

If a promise be entire and void in part, not being in writing, it is void altogether, though part is not within the statute.

But where the defendant (an auctioneer) was about to sell a tenant's effects in August, and the plaintiff (the landlord) told him that there would be nearly a year's rent due at the Michaelmas following, and that unless he, the defendant, promised to pay him, he would put in a distress; the defendant then, in consideration that the plaintiff would not distrain, verbally promised to pay not only the rent *then* due, but also the rent that would be due at Michaelmas; held, that the promise to pay the accruing rent exceeded the consideration, for if the plaintiff had been paid the rent then due, he could have sustained no loss by the sale of the goods; it was nothing more than a promise to pay money that would have become due from a third person; it was therefore within the words of the statute, and the mischief intended to be remedied thereby, and consequently void. And though the promise to pay the arrears due at the time might have been good if confined to those arrears, yet

^a *Williams v. Loper*, 2 Wils. 408. 3 Burr. 186. In this case "there was a power of immediate distress, and an intention to enforce it; and I think the judges must be understood to have considered that power as equivalent to an actual distress." *Per Lord Tenterden*, C. J., in *Thomas v. Williams*, 10 B. & C. 670. (31 Eng. C. L. 144.)

^b *Edwards v. Kelly*, 6 M. & S. 204. Where the plaintiff, at the request of the defendant, became a co-surety with him in an indemnity bond, to a third person, on the defendant's promise to save him harmless: Held, that the promise was not within the statute. *Thomas v. Cooke*, 8 B. C. 728. (15 Eng. C. L. 333.)

^c *Bampton v. Paulin*, 4 Bing. 264. (13 Eng. C. L. 495.)

^d *Stephens v. Pell*, 2 C. & M. 710. 4 Tyr. 6.

as the promise was entire, and in its commencement void in part, it was void altogether, and the plaintiff could recover nothing.* "There is no case," said Lord Tenterden, C. J., "in which the promise of payment has gone beyond the amount of the right vested in the party to whom the promise was made, or beyond the assumed value of the fund out of which the payment was to be made. In *Edwards v. Kelly*, the landlord delivered the goods which he had distrained to the defendant to be sold, in consideration of his promise to pay the rent due, for which the distress had been taken. In *Castling v. Aubert*, the plaintiff gave up to the defendant policies of insurance, on which the plaintiff had a lien, to secure himself against bills, which he on the faith of that lien had accepted for the accommodation of the assured, and the person to whom he delivered them promised to discharge the bills, and give to the plaintiff the same indemnity that his lien afforded him. In these cases the promise was founded on a new consideration, distinct from the demand that the plaintiff had against the third person, although its performance would have the effect of discharging that demand, and releasing that person."^b *1031

Although the decisions on this subject can scarcely be deemed conflicting, yet it is difficult to lay down any rule with which all the authorities can be reconciled. The inference, however, from the preceding decisions is, that though the debt of a third party be the subject matter of a promise, yet if the promise be founded on a new and distinct consideration co-extensive therewith, and moving, not to the third party, but to the person who makes the promise; or if the third party be not liable to be sued on the debt, when the promise is made, it is not within the statute.

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cisions.

SECTION VII.

STATEMENT OF THE CONSIDERATION.

A PROMISE to pay the debt of another must be founded on a sufficient consideration, as well as any other promise; and it is settled by the authority of numerous decisions, that to satisfy the statute of frauds the consideration must appear on the written undertaking on which the action is brought, as well as the promise itself, and the omission of it cannot be supplied by parol evidence, the ground of such decisions being, that the term "agreement," used in the 4th section, includes both the

* *Thomas v. Williams*, 10 B. & C. 664. (31 Eng. C. L. 143.) See *Chater v. Becket*, 7 T. R. 201.

^b *Per Lord Tenterden*, C. J., 10 B. & C. 670. (31 Eng. C. L. 145.)

consideration for the promise and the promise itself. If the consideration does not appear on the face of the written memorandum on which the action is brought, it is *nudum pactum*, and the defendant will not be liable thereon.*(1)

*1032
A party cannot be charged on a promise to pay the debt of another, unless the consideration for the promise, as well as the promise itself, be in writing.

*This doctrine was first laid down in *Wain v. Warlters*, wherein the defendant was sued on his guarantee, which was in these words, "Messrs. Wain and Co., I will engage to pay you by half-past four this day, 56*l.*, and expenses on bill that amount on Hall," signed John Warlters. To this it was objected that it did not express the consideration of the defendant's promise, and parol evidence of the consideration having been offered, Lord Ellenborough, before whom the cause was tried, refused to receive it, and nonsuited the plaintiff. A rule *nisi* having been obtained for setting the nonsuit aside, the court, after hearing the arguments of counsel on both sides, discharged it, Lord Ellenborough, C. J., observing, that "the obligatory part was indeed the *promise*, which would account for the word *promise* being used in the first part of the clause; but still in order to charge the party making it, the statute proceeded to require that the *agreement*, by which was to be understood the *agreement in respect of which the promise was made*, must be reduced into writing. And indeed it seemed necessary for effectuating the object of the statute, that the consideration should be set down in writing, as well as the promise; for otherwise the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged might not afterwards be able to prove, the omission of which might materially vary the promise, by turning that into an absolute promise which was only a conditional one." Grose, J., "What the statute requires in writing, is the *agreement*, (not the promise, as mentioned in the first part of the clause,) or some *note or memorandum of the agreement*. If the court were to adopt the construction contended for on behalf of the plaintiff, it would be the means of letting in those very frauds and perjuries which it was the object of the statute to prevent, for without the parol evidence the defendant could not be charged upon the written contract for want of a consideration in law to support it. The effect of the parol evidence would then be to make him liable, *and thus he would be charged with the debt of another by parol

* *Wain v. Warlters*, 5 East, 10. *Saunders v. Wakefield*, 4 B. & A. 595. (6 Eng. C. L. 531.) *Goodman v. Chase*, 1 E. & A. 297. *Newbury v. Armstrong*, 6 Bing. 201. (19 Eng. C. L. 55.) *Per Tindal*, C. J., in *Hawes v. Armstrong*, 1 Bing. N. C. 761. (27 Eng. C. L. 565.) 1 Hodges, 183. *Barrell v. Trussell*, 4 Taunt. 117. *Atkinson v. Carter*, 2 Chitt. 403. (18 Eng. C. L. 379.) *Morley v. Boothby*, 3 Bing. 107. (11 Eng. C. L. 53.) *Jenkins v. Reynolds*, 3 B. & B. 14. (7 Eng. C. L. 328.) 6 Moore, 86. *Chancey v. Pigot*, 2 Ad. & Ell. 473. (29 Eng. C. L. 147.) 1 H. & W. 20. *James v. Williams*, 5 B. & Ad. 1109. (27 Eng. C. L. 280.)

(1) (*Rogers v. Kneeland*, 13 Wend. 114. *Larson v. Wyman*, 14 Wend. 246. *Packer v. Wilson*, 15 Wend. 343. *Stymate v. Brooks*, 10 Wcnd. 206. *Smith v. Ives*, 15 Wend. 182. *Smith v. Ide*, 3 Vermont, 290.)

testimony, when the statute was passed with the very intent of avoiding such a charge, by requiring that the agreement should be in writing." Le Blanc, J., "I think we must take it, that the *agreement* includes the *consideration* for the promise, as well as the *promise* itself."^a

The propriety of this decision was questioned in several subsequent cases, but it was at length fully sustained in the case of *Saunders v. Wakefield*, since which it has been considered as established law. In the latter case, the defendant was sued on his guarantee, which was in these words, "Mr. Wakefield will engage to pay the bill drawn by Pitman in favor of Stephen Saunders;" the court on demurrer recognised the case of *Wain v. Warlters*, and decided that the defendant was not liable on the guarantee, as it did not state the consideration. "The words of the statute," said Abbott, C. J., "are *special promise*. Now, at common law no action would lie, unless there was some specialty or peculiarity in the promise. It is impossible to conceive how there can be such specialty, unless the consideration for the promise be stated; for it is the consideration which makes it a special promise. The consideration, therefore, must have been in the contemplation of the legislature, when they used the words special promise. If so, it will follow that a party is not entitled to recover, unless the written agreement contain some specialty, which cannot be, unless it contain the consideration for the promise."^b

It is observable, that this case was decided upon distinct grounds from that of *Wain v. Warlters*. In the latter case, the court gave their judgment, on the grounds that the word "agreement" included the consideration as well as the promise; whereas in *Saunders v. Wakefield*, the court considered that the words "special promise," included the consideration, and said, that upon principle, independently of the authority of *Wain v. Warlters*, the plaintiff was not entitled to recover.

It is not necessary that the consideration should appear in **express* terms; it is sufficient if the memorandum is so framed that any person of ordinary capacity must infer from the perusal of it, that such, and no other, was the consideration upon which the undertaking was given. But a mere conjecture, however plausible, that the consideration stated in the declaration was that intended by the memorandum, will not be sufficient; there must be a well grounded inference to be *necessarily* collected from the terms of the memorandum, that the consideration stated in the declaration, and *no other* than such consideration was intended by the parties to be the ground of the promise.^c Therefore, where the declaration stated that in consideration that the plaintiffs, at the request of the defendant,

The consideration need not be in express terms; if it can be inferred from the memorandum, it will be sufficient. *1034

^a *Wain v. Warlters*, 5 East. 10.

^b *Saunders v. Wakefield*, 4 B. & A. 595. (6 Eng. C. L. 531.)

^c *Per Tindal, C. J.*, in *Hawes v. Armstrong*, 1 Bing. N. C. 761. (27 Eng. C. L. 565.) 1 Hodges, 184.

would give for the payment of a debt of 260*l.*, then due from *A.* to *D.* and would take, by way of security, certain bills of exchange, and would forbear to sue the said *A.* and *D.* until the bills should become payable; the defendant promised to see the said bills paid, &c. Plea, that there was no undertaking in writing; replication, that there was the following memorandum, "enclosed I send you the bill drawn by *A.* upon and accepted by *D.*, which I doubt not will meet with due honor; but in default thereof, I will see the same paid;" held, on demurrer, that the consideration was not set forth with sufficient certainty; for there was nothing whatever in the letter itself that necessarily connected the undertaking of the defendant with the consideration of forbearance; no expression to denote that the bills were delivered in satisfaction of, or as security for the debt due from *A.* to *D.* to the plaintiffs, nor even any mention that any debt was due to them. As the consideration for the defendant's promise was left in complete uncertainty on the defendant's letter, it was not sufficient to satisfy the statute.* So where the guarantee was in these words, "Mr. *H.* being about to proceed to Barbadoes, having incurred an account with you amounting to 49*l.* 5*s.*, with the understanding that he is to transmit the amount to you in three months, &c., we guarantee the performance of the said engagement, and

*1035 *in failure thereof we will be responsible to you;" held insufficient.^b

So where the terms of the undertaking were as follows: "As you have a claim on my brother for 5*l.* 17*s.* for boots and shoes, I hereby undertake to pay you the amount within six weeks from this day;" it was held, that the consideration did not sufficiently appear.* So where the memorandum was in these terms, "*R.* plaintiff, and *J.* defendant; we the undersigned jointly and severally undertake to pay *G. C.* the debt and full costs in this action, provided on or before the 1st of January, 1831, the sum of 11*l.* 10*s.* 3*d.* be not paid to him at his office as attorney for the plaintiffs;" held insufficient. Lord Lyndhurst, C. B., observed, "on looking at the instrument, various interpretations might be put upon its language, and several considerations with much ingenuity conjectured. It appears to me, that if in such a written agreement to be answerable for the debt of another person, *two distinct considerations may with equal probability be inferred, as the inducement for the engagement*, the writing is not taken out of the operation of the statute of frauds, and consequently can give no right of action."^d

So where the words were, "whereas *H. S.* has hired a ship for six months from the 12th of July, 1830, and such longer time as his intended voyage may require, and has paid or se-

* *Id.*

^b *Id.*

* *James v. Williams*, 5 B. & Ad. 1109. (27 Eng. C. L. 280.) 3 N. & M. 196.

^d *Cole v. Dyer*, 1 C. & J. 461.

cured the freight for six months, from the 20th of August, 1830, and is about to leave E.; I guarantee the payment of freight which shall accrue for any portion of the voyage after the said six months;" held insufficient for want of consideration apparent on the face of it.* So where the guarantee was, "I hereby agree to see you paid, within three months from the date hereof, the amount of 5*l.*, due to you on account of Mr. G—M—, Jun."†

*If the consideration can be gathered by a fair intendment from the whole tenor of the writing, it is sufficient. And it is observable, that when an agreement is in its nature prospective, such an inference is much more easily arrived at than when it is in its nature retrospective. *1036

Where the terms of the guarantee were as follows: "You will be so good as to *withdraw the promissory note*, and I will see you, at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole 45*l.*;" a promissory note for 35*l.*, made by the defendant's son, and payable to the plaintiff, was proved at the trial, but not the memorandum; the guarantee was proved, and a subsequent admission by the defendant, that he had to pay the plaintiff 45*l.*, due from his son; held, that the *withdrawing of the promissory note* was a sufficient consideration to satisfy the statute of frauds, though the letter left it uncertain what the note was, and whether it was a note of the father or of the son. The consideration being executory, the plaintiff was to show that he had fulfilled it, and for that purpose must of necessity prove, by parol evidence, that the note withdrawn by him was the thing meant by the agreement. If it had appeared in proof that there were two notes to which the promise might have applied, there might have been a difficulty as to explaining this by parol testimony. But when the evidence given was of one note only, it was clear that the plaintiff had complied with his part of the agreement. When the consideration is executory.

So where the guarantee was as follows: "I undertake, on behalf of Mr. Peate, (in consideration of Mr. Dicken having this day given me an undertaking to procure Mr. Ward's check or note in favor of Mr. Peate for 150*l.*, on account of a debt due from Mr. Chambers to Mr. Peate,) that Mr. Chambers shall have credit for that sum in his accounts with Mr. Peate, and that Mr. Ward shall stand in the place of Mr. Peate to that amount; and I further undertake, that Mr. Peate shall not personally dispute Mr. Ward's right to deduct that sum *from the accounts owing by the colliers of the Black Park Colliery to Mr. Chambers;" held, that this agreement showed a sufficient consideration moving from the plaintiff.‡ *1037

* Bushell v. Bevan, 1 Bing. N. C. 103. (27 Eng. C. L. 320.) 4 M. & Scott, 692.

† Chancey v. Pigott, 3 Ad. & Ell. 473. (29 Eng. C. L. 147.) 1 H. & W. 20.

‡ N. & M. 496. See Morley v. Boothby, 3 Bing. 107. (11 Eng. C. L. 53.)

* Shortrede v. Cheek, 1 Ad. & Ell. 57. (28 Eng. C. L. 37.)

‡ Peate v. Dicken, 1 C. M. & R. 422. 3 Dowl. 177. 5 Tyr. 116.

So when the defendant addressed a letter to the plaintiff's attorney in these terms: "The bearer *D.* has a sum of money to receive from a client of mine some day next week, I trust that you will give him indulgence until that day, when I undertake to see you paid;" held sufficient, though it did not specify the sum, which was allowed to be proved by parol evidence.^a

The following guarantees have been held sufficient:—"I do hereby agree to become security for *R. G.*, now your traveller, in the sum of 500*l.*, for all moneys which he *may* receive on your account."^b "To Mr. *N.*—I do hereby agree to bind myself to be security to you for *C. J.*, late in the employ of Mr. *R.*, for whatever, while in your employ, you *may entrust him with*, to the amount of 50*l.*, in case of default to make the same good."^c "I guarantee the payment of any goods which *T. S.* delivers to *J. N.*"^d

Where the defendant signed and gave a guarantee to the plaintiff, stating that his ship was chartered, and that the charterer having paid one half the freight, and given the plaintiff his acceptance for the remaining half, at four months' date, the defendant engaged to be accountable to the plaintiff for the amount of the said acceptance, should it not be paid when due: held, that the consideration clearly appeared on the face of such guarantee, as the bill would not have been taken unless thus signed.^e

*1038 So where the plaintiff, being a merchant abroad, was in the habit of dealing with *F. S.*, and having shipped goods for him to the amount of 1,026*l.*, and suspecting his solvency he requested the defendant to enter into a guarantee for the payment of the above sum, when he wrote a letter, addressed to the plaintiff, stating that *F. S.*, having accepted a bill drawn on him by the plaintiff for 1,026*l.*, he gave his guarantee for the due payment of the same, in case it should be dishonored by the acceptor; held sufficient.^f

It is, however, difficult to reconcile the two last cases with the modern authorities, for they only disclose a past consideration, without showing that the bills were taken at the defendant's request.^g

^a *Bateman v. Phillips*, 15 East, 270.

^b *Ryde v. Curtis*, 8 D. & R. 62. (16 Eng. C. L. 335.)

^c *Newbury v. Armstrong*, 6 Bing. 201. (19 Eng. C. L. 55.) M. & M. 389. 4 C. & P. 591.

^d *Stadt v. Lill*, 9 East, 348. See *Morris v. Stacey*, Holt, 153. (3 Eng. C. L. 58.)

^e *Pace v. Marsh*, 8 Moore, 59. 1 Bing. 216. (8 Eng. C. L. 302.)

^f *Boehm v. Campbell*, 8 Taunt. 679. (4 Eng. C. L. 245.) 3 Moore, 15.

^g See *Bushell v. Bevan*, and other cases, *ante*, 1035, and the observations of *Best, C. J.*, in *Morley v. Boothby*, 3 Bing. 114. (11 Eng. C. L. 56.)

SECTION VIII.

AGREEMENT IN CONSIDERATION OF MARRIAGE.

It is clearly settled, that mutual promises to marry are not within the statute, and that its provisions extend only to agreements to pay money, or do some collateral act in consideration of marriage.^a Where a father promised his daughter 3000*l.*, and died before her marriage, leaving her 2000*l.* only, a bill filed by her husband, to obtain the other 1000*l.*, was dismissed, because the marriage was not contracted in expectation of 3000*l.*^b A parol agreement to pay money, or make a settlement in consideration of marriage, is void, and a recognition after marriage of a parol promise before marriage, will not take the case out of the statute.^c A subsequent marriage is not sufficient to take a previous parol agreement out of the statute, as a part performance.^d

*SECTION IX.

*1039

CONTRACTS FOR THE SALE OF LANDS.

A CONTRACT for the sale of lands, &c., within the meaning of the fourth section, must relate to the sale of the fee simple, or of some less interest than the fee and give to the purchaser an exclusive right to the land for a limited period.^a The statute however, is not confined merely to contracts relative to houses and lands in the common acceptance of those terms; it extends to agreements, the subject matter of which partakes of the realty.⁽¹⁾ Contracts the subject matter of which partakes of the realty, must be in writing.

An agreement to take lodgings is within the meaning of the statute, and cannot be enforced unless reduced to writing.^f Where in a contract for letting a furnished house the defendant undertook to supply proper furniture; held, in an action for not supplying the furniture after the plaintiff had taken possession. A contract for letting a furnished

^a B. N. P. 280. *Harrison v. Cage*, *Ld. Raym.* 386. 1 *Salk.* 24. *Cocke v. Baker*, *Stra.* 33.

^b *Ayliff v. Tracey*, 2 P. Wms. 45.

^c *Randall v. Morgan*, 12 Ves. 73.

^d *Maxwell v. Montacute*, *Prec. Chan.* 526. 1 P. Wms. 618. *Taylor v. Beech*, 1 Ves. 297. See *Shaw v. Jakeman*, 4 East, 201.

^e Per *Littledale, J.*, in *Evans v. Roberts*, 5 B. & C. 839. (19 Eng. C. L. 382.) And in *Smith v. Surman*, 9 B. & C. 573. (17 Eng. C. L. 446.)

^f *Edge v. Stafford*, 1 C. & J. 391. *Inman v. Stamp*, 1 Stark. 12.

(1) (*Mumford v. Whitney*, 15 Wend. 380.)

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Contracts
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session, that the contract for letting the house and supplying the furniture was entire, and related to an interest in land, within the 4th section of the statute of frauds, and there being no memorandum thereof in writing, the action could not be maintained.^a So is the sale of growing underwood to be cut by the purchaser.^b So is an agreement for *prima vestura*, or growing grass to be mown and made into hay by the vendee, whereby the exclusive right to the land is obtained for a limited time.^c

A sale of growing turnips, no time being stipulated for their removal, and the degree of their maturity not being positively found, has been held to be a contract for an interest in land within the meaning of this section.^d

But in a subsequent case, where all the previous decisions were reviewed, it was held that the sale of a growing crop of potatoes was not a contract, or sale of lands, &c., within the fourth section, but a sale of goods, merchandises, &c., within the 17th section; for it did not give to the vendee a right to the possession of the land. Bayley, J., said, "that the contract was not for the sale of any interest in or concerning land, but a contract for the sale of things, which at the time of the delivery were to be goods and chattels; crops raised by labor, such as corn and potatoes, were emblements, which went to the executor and not to the heirs, they might be seized under a

*1040 *fi. fa.*; therefore, in contemplation of law, they must be considered chattels. They were distinguishable from the natural and permanent productions of the soil, such as growing grass, apples upon trees, &c., which belonged to the freehold, and went to the heir. It was immaterial that the vendee acquired a right by his contract to have the crop continue in the land of the seller until it arrived at maturity; for a party entitled to emblements had the same right, and yet he was not by that right considered to have an interest in the land." Holroyd, J., said "that the vendee acquired no interest, so as to entitle him to the possession of the land for a period, however limited; he had only an easement, a right to come upon the land for the purpose of taking up and carrying away the potatoes; but that gave him no interest in the soil." Littledale, J., was of opinion "that a sale of the produce of the land, whether it was in a state of maturity or not, provided it was in actual existence at the time of the contract, was not a sale of lands, &c., within the meaning of the fourth section, which seemed to him to mean land taken as mere land, and not its annual growing productions."^e

And in a subsequent case, where the plaintiff, being the

^a Mechelen v. Wallace, 2 Nev. & Perr. 224.

^b Soorell v. Boxall, 1 Y. & J. 396.

^c Crosby v. Wadsworth, 6 East, 602. Shelton v. Livins, 2 C. & J. 411. 2 Tyr. 420.

^d Emmerson v. Heelis, 2 Taunt. 38.

^e Evans v. Roberts, 5 B. & C. 829. (12 Eng. C. L. 377.)

owner of trees growing upon his land, sold to the defendant the timber at so much per foot; the court held, that it was not within the meaning of the fourth section; for it was not a contract for the growing trees, but for the timber at so much per foot; i. e. for the produce of the trees when they should be severed from the freehold; the vendee could take no property in them until they were cut. It was a contract for the sale of goods within the seventeenth section.^a

But if there be one entire contract made at the same time, partly an interest in land, and partly for crops or other chattels, the latter part falls within the meaning of the fourth section as well as the former. As where the plaintiff let a farm to the defendant for 14 years, and the latter agreed to take the crops growing thereon, at a valuation, in assumpsit for the value of the crops, and for work and labor, and materials done and used in preparing the land for tillage; the court held that the agreement was within the fourth section, for the contract was entire, both for the crop and the land. When the contract was made, the crops were growing on the land; by the agreement the defendant was to have the land as well as the crops and the work, labor, and materials, were so incorporated with the land, as to be inseparable from it. The defendant could derive no benefit from the work and labor unless he had the land. The court were of opinion that both a right to the crops, and the benefit of the work, labor, and materials, were an interest in the land; but if either of the two was properly an interest in the land, it would be a sufficient objection to the action, the contract not being in writing.^b

*1041

Where the land is sold, and the vendee takes from the vendor the growing crops, the latter are considered part of the land.^c It is otherwise, however, when the contracts respecting the crops or chattels is distinct from that relating to the land. As where the plaintiff quitted his farm in March, and was succeeded by the defendant; there being forty acres of wheat sowed by the plaintiff he asked the defendant if he would take the wheat at 200*l.*, telling him that if he did not, he should not have the farm; the defendant said he would take it. The defendant also took the dead stock at a valuation, and promised to pay for the wheat and the dead stock on a given day; held, that the contract relating to the wheat and the dead stock was not within the fourth section.^d

The result of the authorities on this subject appears to be Result of

^a *Smith v. Surman*, 9 B. & C. 561. (17 Eng. C. L. 443.) See *Watts v. Friend*, 10 B. & C. 446, (21 Eng. C. L. 109,) *post*, 1053.

^b *The Earl of Falmouth v. Thomas*, 1 C. & M. 89. 3 Tyr. 26. *Cooke v. Tombs*, 2 Anst. 420.

^c *Per Littledale, J.*, in 3 B. & C. 366. (10 Eng. C. L. 114.)

^d *Mayfield v. Wadsley*, 3 B. & C. 357. (10 Eng. C. L. 110.) *Per Bayley, J.*, and *Holroyd, J.* *Abbott, C. J.*, doubted whether the contract relating to the wheat was within the 4th section. *Littledale, J.*, was of opinion in the affirmative. All agreed that the contract relating to the dead stock was not within the statute.

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that contracts for the sale of crops cultivated by labor and *expense, such as corn, potatoes, clover, &c., which do not confer on the vendee any other right to the land than what is necessary for his enjoyment of the crops, do not fall within the meaning of the 4th but of the 17th section:^a whereas contracts relating to the natural productions of the soil, such as growing grass, trees, &c., fall within the 4th section,^b unless they are to be cut down immediately, in which case they are to be deemed chattels, and therefore within the 17th section.^c

If a party under a void parol contract fell and remove timber, or take away a growing crop, he is liable as for goods sold, although had he not carried the new parol agreement into execution, he could not have been sued thereon.^d If a party repair premises under a void parol agreement so to do, in consideration of the assignment of a house which the other party refuses to assign, action for work and materials may be sustained to recover the value of the repairs performed.^e

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Plaintiff having really bargained with *J. E.* for the sale of some houses, sold the bargain to defendant for 40*l.*; and *J. E.* at the request of defendant, conveyed the premises to *P.*, who was not a trustee for defendant; a verdict having been found for the plaintiff in an action for the recovery of this 40*l.*, the court refused to enter a nonsuit, which was moved for on the *grounds, first, that the oral bargain for the interest in the houses could never have been enforced, and therefore could not form the consideration of an assumpsit; secondly, that the house had never been conveyed to the defendant.^f

If the agreement does not strictly relate to land, it will not come within the act. A tenant having agreed with his landlady that if she would accept another for her tenant in his place, (he being restrained from assigning the lease without her consent,) he would pay her 40*l.* out of 100*l.* which he was to receive for the goodwill, if her consent were obtained; and

^a *Parker v. Staniland*, 11 East, 362. *Warrick v. Bruce*, 2 M. & S. 205. *Evans v. Roberts*, 5 B. & C. 829. (12 Eng. C. L. 377.)

^b *Crosby v. Wadsworth*. *Scorell v. Boxall*, *ante*, 1039.

^c *Smith v. Surman*, *ante*, 1040. A contract for the sale of an interest in land, without a note in writing, may operate as a *license* so as to excuse the entry of the purchaser on the land, but it cannot be made available in any way as a contract. Therefore where a party had purchased by a verbal contract, a growing crop of grass, with liberty to go on the close wherein it grew for the purpose of cutting and carrying it away; it was held, that he could not maintain trespass against the seller for taking away his horse and cart from the close, which he had brought there for the purpose of carrying away the grass; for that it was in substance an action charging the defendant on the contract, within the 4th section; which, as it was void by reason of its not being in writing, could not be available to give a right capable of being enforced by action. *Carrington v. Roots*, 2 Mees. & Wels. 248. 1 Mur. & H. 14.

^d *Teall v. Auty*, 2 B. & B. 99. (6 Eng. C. L. 32.) 4 Moore, 542. *Bragg v. Cole*, 6 Moore, 114. (17 Eng. C. L. 19.) *Poulter v. Killingbeck*, 1 B. & P. 398.

^e *Gray v. Hill*, R. & M. 420. (31 Eng. C. L. 479.) And see *Adams v. Fairbank*, 2 Stark, 277. (3 Eng. C. L. 345.)

^f *Seaman v. Price*, 2 Bing. 437. (9 Eng. C. L. 469.) But see *Bartlett v. Pickersgill*, 4 East, 557, *n.*

having received the 100*l.* from the new tenant, who was cognisant of that agreement, he is liable to the landlady in an action for money had and received to her use, the consideration being executed, and therefore the case being taken out of the statute of frauds, as a contract for an interest in land.^a

The statute does not invalidate an executed parol contract, so, as to prevent a party to it from maintaining an action for a breach of it, where the breach does not relate to an interest in land, although the contract itself stipulates that the defendant shall be substituted as tenant in the stead of the plaintiffs, of premises in their occupation.^b If *A.* agree with *B.* to let him land rent-free, on condition that *A.* shall have a moiety of the two succeeding crops, the agreement need not be in writing under the statute.^c

A. grants a lease of premises to *B.*, who afterwards takes *C.* into partnership; *B.* and *C.* apply jointly to *A.* to enlarge the premises, agreeing to pay 10*l.* *per cent per annum* on the money laid out, which is accordingly done, and *B.* and *C.* dissolve partnership; held, that the agreement is only collateral to the lease, and not a new demise, and therefore, that it is not within the statute of frauds, and that *A.* is entitled to recover on it in an action against *B.* and *C.*^d

A license to enjoy a beneficial privilege, or grant of an easement *to be exercised upon the grantor's land, is within the statute, and must be in writing; but a parol permission to the grantee to use his own land in a way in which, but for an easement of the grantor, such grantee would have a clear right to use it, is not within the act; and in the latter case the grantor could not retract his license without reimbursing the grantee any expense incurred in consequence of it.^e *1044

The day for the completion of a purchase of an interest in land inserted in a written contract cannot be waived by a parol agreement, and another day substituted in its place so as to bind the parties, for that would be virtually to allow an action to be brought on an agreement relating to the sale of land partly in writing signed by the parties, and partly not in writing but by parol only, which would be in contravention of the statute of frauds.^f

^a Griffith v. Young, 12 East, 513.

^b Price v. Leyburn, Gow. 109. (5 Eng. C. L. 477.)

^c Poulter v. Killingbeck, 1 B. & P. 397. And see Bristow v. Waddington, 2 B. & P. 452.

^d Hoby v. Roebuck, 2 Marsh. 433. 7 Taunt. 157. (9 Eng. C. L. 57.)

^e See Winter v. Brockwell, 8 East, 309. Hewlins v. Shippam, 5 B. & C. 221. (2 Eng. C. L. 207.) In the former case a parol license to put a skylight over the defendant's area, which impeded the light and air from coming to the plaintiff's house through a window, was held good. But a parol license to have the water flowing in a tunnel over the grantor's land is void. Fentiman v. Smith, 4 East, 107. And see Hewlins v. Shippam. A mere license to use land is not within the statute. See Wood v. Lake, Sayer, 3. Webb v. Paternoster, Palm. 71, ante, 1017.

^f Stowell v. Robinson, 3 Bing. N. C. 928. (32 Eng. C. L.) Goss v. Lord Nugent, 5 B. & Ad. 58. (27 Eng. C. L. 33.)

SECTION X.

AGREEMENTS NOT TO BE PERFORMED WITHIN A YEAR.

Part performance within the year. CONTRACTS which are not to be carried into full effect within a year from the making thereof, cannot be enforced unless reduced into writing; a part performance within the year will not take the case out of the statute, if there was an express understanding between the parties, at the time that the contract was entered into, that it should not be completed within a year.⁽¹⁾ Thus, a contract for a year's service to commence at a future day is within the statute, for it is not to be performed within a year, and no action can be maintained for a breach thereof, unless it be in writing.^a So is an agreement to enter into partnership for ten years.^b So where a coachmaker agreed to let a carriage for five years, at ninety guineas per annum; it was held to be within the statute, though by the custom of trade the contract was determinable at any time on payment of a year's hire, for by the very terms of the contract it was an agreement not to be performed within a year.^c

- *1045 *So an agreement to become a subscriber to the *Boydell Shakspeare*, being a series of prints to be published in numbers, an undertaking which it was evident the parties contemplated could not be performed or brought to a close for several years, has been held to be within the statute.^d But where a party agreed to take a work which was to be published in eighteen numbers at intervals of two months, and after receiving several numbers, refused to take any more, or to pay for those which he had; it was held, that an action would lie for the price of the latter, though the original contract was not in writing, or to be performed within a year; for the law in such cases would imply a further contract to pay for each number as it was delivered.^e

Where the performance depends on a contingency, the The statute, however, does not extend to contracts, the performance of which depends upon a contingency, which may or may not happen within a year, or to cases where all that is to be done by one of the parties is to be done within a year. As where the defendant promised for one guinea to give the plain-

^a *Bracegirdle v. Heald*, 1 B. & A. 722. *Snelling v. Huntingfield*, 1 C. M. & R. 20. 4 Tyr. 606.

^b *Williams v. Jones*, 5 B. & C. 108. (11 Eng. C. L. 169.)

^c *Birch v. Liverpool*, (Earl of,) 9 B. & C. 392. (17 Eng. C. L. 404.)

^d *Boydell v. Drummond*, 11 East, 142. This was an action for not accepting or paying for the residue of the numbers, the defendant having for a time taken in the numbers, and paid for them so much per number, according to the parol agreement.

^e *Mavor v. Pyne*, 3 Bing. 285. (11 Eng. C. L. 104.) 2 C. & P. 91. (12 Eng. C. L. 41.)

(1) (*Squire v. Whipple*, 1 Vermont, 69. *Drummond v. Barrell*, 13 Wend. 307. *Plimpton v. Curtis*, 15 Wend. 336.)

tiff so many on the day of his marriage; it was held, not to be within the statute, and that an action would lie upon the agreement, though it was not in writing, though the marriage did not take place within a year, for it might have happened within the year.^a So a promise to pay money on the death of a certain person, is not within the statute.^b So where *A.* promised that his executors should pay the plaintiff 1,000*l.* in consideration of his forbearing to sue *A.* for a debt; it was held not to be within the act, and that the promise need not be in writing.^c

Where the defendant was tenant to the plaintiff under a lease for twenty years, and in consideration that the plaintiff would lay out 50*l.* in alterations, the defendant promised to pay the plaintiff 5*l.* a year during the remainder of the term. The alterations having been completed within the year, and an action having been brought for the increased rent, it was objected that as the contract could not possibly be performed within a year, it ought to have been in writing. But the court held that it was not within the statute. Littledale, J., in delivering the judgment of the court, observed, "that as the contract was entirely executed on one side within the year, and as it was the intention of the parties, founded on a reasonable expectation that it should be so, the statute of frauds did not extend to it. In case of a parol sale of goods, it often happened that they were not to be paid for in full, until after the expiration of a longer time than a year; and surely the law could not sanction a defence on that ground, where the buyer had had the full benefit of the goods on his part."^d

statute
does not
apply.

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SECTION XI.

MEMORANDUM OR NOTE IN WRITING.

THE statute does not require a formal agreement; any memorandum signed by the party expressing that he had entered into the agreement, and showing the terms thereof, is sufficient, although it be a mere recognition or adoption of a prior parol contract.^e Thus, a memorandum by the defendant on the back of the draft of a lease, acknowledging that he had

What me-
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dum is
sufficient
within the
statute.

^a Peter v. Compton, Skinner, 353. Smith v. Westall, 1 Lord Raym. 316. Anon. Comb. 463. 1 Salk. 280. Francam v. Foster, Skin. 356.

^b Fenton v. Emblers, 3 Burr. 1278.

^c Wells v. Horton, 4 Bing. 40. (13 Eng. C. L. 332.) 12 Moore, 176.

^d Donellan v. Read, 3 B. & Ad. 899. See Hoby v. Roebuck, 7 Taunt. 157, ante, 1043. Boydell v. Drummond. Bracegirdle v. Heald, ante, 1044-5. See also Smith's Selection of Leading Cases, 144.

^e Ch. Con. 59.

agreed to take the premises mentioned in the draft on the terms therein stated, has been held sufficient;^a so has a letter containing the terms of the agreement.^b

Nor is it essential that the memorandum should be delivered to the other party. A letter written by a man to his own agent, setting forth the terms of the agreement, has been held sufficient.^c So where the father wrote a letter to a friend of the plaintiff's, the intended husband of his daughter, agreeing to give 500*l.* to his daughter on her marriage, to be charged upon his land, it was held sufficient.^d But a letter from a father to his daughter, intimating that he had agreed with the plaintiff, who courted her, to give her a portion of 3,000*l.*, which letter was not communicated to the plaintiff until after the marriage, was held not to be binding.^e

The agreement may be comprised in several distinct papers.

The agreement may be collected from several distinct papers, provided they be sufficiently connected in sense by reference from one to another; but the connection must appear on the face of the documents themselves, for oral evidence will not be admitted for the purpose of connecting them. As where upon a sale of an interest in land by auction, the vendee signed a contract on the back of the printed particulars of sale which contained the conditions, but there was no signature by the vendors or by any one authorised by them; the court held that a subsequent letter written by one of the vendors, in which he spoke of the sale, as "our sale to the vendee," and referred to the conditions, was, coupled with the contract, sufficient to satisfy the statute. "The principle," said Lord Denman, C. J., in delivering the judgment of the court, "appears to be that where there is a contract in writing, which is binding on one party, any note in writing which is subsequently signed by the other party is sufficient to satisfy the statute, if it either in itself or by reference to other documents contains the terms of the contract. Here the letters of the vendors expressly refer to the condition of the sale, signed by the vendee; so that no parol evidence beyond mere proof of handwriting was necessary to show the terms of the contract."^f

But where the defendant entered his name in a book, entitled "Shakspeare subscribers, their signatures," not referring
 *1048 *to a printed prospectus, which contained the terms of the con-

^a *Id.* Shippey v. Derrison, 5 Esp. 190; and see Stead v. Liddiard, 1 Bing. 196. 8 Moore, 2.

^b Kennedy v. Lee, 3 Mer. 441.

^c Per Lord Hardwicke, 3 Atkin, 503. 2 Stark. Ev. 350. Bateman v. Phillips, 15 East, 272.

^d *Id.*

^e Aylliffe v. Tracy, 2 P. Wms. 65. See Laders v. Anstey, 4 Ves. 501. A proposal by letter, when acceded to by parol, is sufficient, although it be afterwards retracted, and again agreed to by parol. 2 Stark. Ev. 351.

^f Dobell v. Hutchinson, 3 Ad. & Ell. 355. 5 N. & M. 251. 1 H. & W. 394. Jackson v. Lowe, 1 Bing. 9. Saunderson v. Jackson, 2 B. & P. 291. Allen v. Bennett, 3 Taunt. 169, *post*, 1061.

tract, and which was delivered at the time to the subscribers; the court held, that though the prospectus would be a sufficient memorandum of the agreement, if it could be coupled with the book in which the defendant signed his name, still, as it contained no reference to the book, nor the book to it, there was no connection in sense between them, whereby they could be coupled together and treated as one document; and such connection could not be introduced by parol evidence.^a

The receipt of deposit money, by an auctioneer's clerk, which was paid over to the seller, and a letter from the solicitors of the seller, admitting that no title could be made, and offering to relinquish the purchase, and pay the charges of investigating the title, were held not to amount to a ratification of an imperfect contract for the sale of property by auction, which was only signed by the purchaser and the auctioneer's clerk in the character of witness, so as to satisfy the statute; for the receipt of the money was a transaction distinct from the power to contract, and was within the ordinary scope of the clerk's duty; and the letter, not containing any of the terms of the contract, could not be connected with what had been previously done, without resorting to parol evidence.^b

The memorandum must be *signed* by the party to be charged or his agent. It is not sufficient to identify his handwriting on the face of the instrument, his name must appear therein.^c But the mark of a marksman, or writing the initials of the name, is sufficient.^d It is not necessary that the signature should be in writing, a printed name recognised is a sufficient signature to take the case out of the statute.^e It is immaterial in what part of the instrument the signature is contained. An agreement in the handwriting of the vendor, beginning "I, A. B., agree to sell," and signed by the vendee only, is sufficient to bind both parties.^f A signature by a party as a witness to a deed, which recited the agreement, has been held to be sufficient, as he knows the contents.^g

The memorandum need only be signed by the party against whom it is sought to enforce the contract. Where the defendant signed a memorandum on the back of a bill, containing the particulars and conditions of sale of certain premises, which

What is a sufficient signing.

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If signed by the party charged, it is sufficient.

^a *Boydell v. Drummond*, 11 East, 152. *Richards v. Porter*, 6 B. & C. 437, (13 Eng. C. L. 239,) *post*, 1062. See *Smith's Selection of Leading Cases*, 137.

^b *Gosbell v. Archer*, 2 Ad. & Ell. 500. (29 Eng. C. L. 159.) 1 H. & W. 31, *post*, 1063, *n*.

^c *Selby v. Selby*, 3 Mer. 2. 1 P. W. 770. 1 Ch. Stat. 374.

^d *Phillimore v. Barry*, 1 Camp. 513, *post*. 1061.

^e *Schneider v. Norris*, 2 M. & S. 286. *Saunderson v. Jackson*, 2 B. & P. 238, *post*, 1061.

^f *Knight v. Crockford*, 1 Esp. 189. See *Stokes v. Moore*, 1 P. Wms. 790. *Ogilvie v. Foljambe*, 3 Mer. 62.

^g *Welford v. Beazeley*, 1 Wils. 118. But see *Gosbell v. Archer*, *post*, 1063, where it was held, that the clerk of an auctioneer, who had signed a contract as a witness, could not be considered as an agent within the statute, and the court doubted that even if he knew the contents, it would be sufficient.

were sold by auction, by which he acknowledged that he was the purchaser; it was held a sufficient compliance with the statute though it was not signed by or on behalf of the vendor. "I think," said Tindal, C. J., "that the object of the fourth section was, that no action should be brought upon any contract, or sale of lands, unless the agreement was signed by the defendant in the action. But it is objected, that by this construction there is a want of mutuality in the contract, because the defendant is without any remedy to enforce the contract, as against the plaintiff. But whose fault is that? The defendant might have insisted that the plaintiff, or his agent, should sign the contract. But it seems to be the object of the statute to secure the defendant's signature; for the preamble declares that the statute was passed 'for the prevention of many fraudulent practices, which are endeavored to be upheld by perjury,' and the beneficial object of the statute is wholly answered by this construction."^a(1)

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*SECTION XII.

AGENT.

An agent's authority under this act need not be in writing;^b and it has been decided, that parol evidence was admissible to show, that a party was an agent, who signed an agreement generally, without expressing that he was an agent.^c An agent cannot depute his authority; therefore the clerk of an agent is not authorised to sign for his principal, though the principal may confirm his act, and thereby render himself liable.^d The agent must be a third party; therefore one of the contracting parties cannot sign as agent for the other.^e An auctioneer is agent for both parties.^f

^a *Laythorpe v. Bryant*, 2 Bing. N. C. 744. (29 Eng. C. L. 469.) 2 *Hodges*, 25. *Seton v. Slade*, 7 Ves. 265. *Westam v. Russell*, 3 Ves. & B. 192. *Egerton v. Matthews*, 6 East, 307. But the contract so signed must disclose the name of the other party. *Champion v. Plumer*, 1 N. R. 252.

^b *Coles v. Trecothick*, 9 Ves. 250.

^c *Wilson v. Hart*, 7 Taunt. 295. (9 Eng. C. L. 112.)

^d *Blore v. Sutton*, 3 Mer. 246. See *Henderson v. Barnwall*, 1 Y. & J. 387, *post*.

^e *Wright v. Dannah*, 2 Camp. 203.

^f *Emmerson v. Heelis*, 2 Taunt. 38. *White v. Proctor*, 4 Taunt. 209. *Kenworthy v. Schofield*, 2 B. & C. 945. (9 Eng. C. L. 285.)

(1) (*Russell v. Nicoll*, 3 Wend. 112.)

SECTION XIII.

THE 29 CAR. II, C. 3, S. 17, AND 9 G. IV, C. 14, S. 7.

SEC. 17, enacts that "no contract for the sale of any goods, wares, or merchandise, for the price of 10*l.* or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised."

Sale of
goods for
the price
of 10*l.*

It having been held in several cases,^a that the above enactment did not apply to executory contracts, or to contracts for the sale of goods which, to the knowledge of the vendee, were not specifically in existence at the time of the sale; and it^{*} being deemed expedient to extend the remedy to such contracts,—

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It was enacted by the 9 Geo. IV, c. 14, s. 7, "that the provisions of the seventeenth section, as aforesaid, should extend to all contracts for the sale of goods of the value of 10*l.* and upwards, notwithstanding that the goods may be intended to be delivered at some future period, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

Of the va-
lue of 10*l.*

It is observable that there is a distinction between the wording of the two sections; for the contract mentioned in the seventeenth section, is for the sale of goods for the *price* of 10*l.*; whereas in the seventh section, it is of goods of the *value* of 10*l.* In reference to this distinction, Tindal, C. J., says, "the extreme accuracy of the mind of the framer of the 9 Geo. IV, c. 14, s. 7, is shown in this; that while the seventeenth section of the statute of frauds in its enactment touching contracts for the sale of goods, employs the word *price*, the framer of the latter act has substituted the word *value*, so that where the parties have omitted to fix a price, it may be open to the jury to ascertain the value in dispute."^b

^a Towers v. Osborne, 1 Stra. 505. Clayton v. Andrews, 4 Burr. 2101. The doctrine laid down by these cases, was, however, overruled by Rondeau v. Wyatt, 2 H. Bl. 62. See Cooper v. Elston, 7 T. R. 14. Astey v. Emery, 4 M. & S. 262. Garbutt v. Watson, 5 B. & A. 613. (7 Eng. C. L. 209.)

^b Hoadly v. M'Lane, 10 Bing. 488. (25 Eng. C. L. 208.)

SECTION XIV.

WHAT CONTRACTS FOR THE SALE OF GOODS ARE WITHIN THESE ENACTMENTS.

ALL contracts for the sale of goods are within the statute, whether the goods are to be delivered immediately or not. Thus, a contract for the sale of flour, which at the time was not prepared and in a state of immediate delivery, was held to be within the statute.^a So a contract to sell oil not then expressed from seed in the vendor's possession.^b So was a contract to *1052 supply a house with pipes, to be laid in a specified manner.^c So, an agreement to furnish chimney-pieces at certain prices, and to finish them in a tradesman-like manner.^d

We have seen that a contract for the sale of growing crops is within the 17th section.^e But whether a contract for the sale of stock falls within the statute, is rather doubtful. In one instance all the judges were divided in opinion upon this point.^f

It is now settled, that a sale by auction is within the seventeenth section of the statute of frauds;^g though it was in one case considered otherwise.^h

But a contract to procure goods, and carry them, is not within the statute. As where the plaintiff agreed by parol, that if the defendant would employ his ship to carry corn, he would procure him coals at *A.*, and convey them to *B.*, at a stipulated price; it was held not to be within the statute.ⁱ

Purchasing several articles at one time at separate prices.

Where a person at one time purchases several articles at separate prices, none of them singly amounting to 10*l.*, but together exceeding that sum, questions have arisen whether it be an entire contract for all, or separate contracts for each; if the former, the statutes apply, if the latter, they do not. Upon this point no general rule can be collected from the decisions; every case must be decided upon its own peculiar circumstances.

Where the defendant, at a public auction, purchased twenty-seven lots of turnips severally, but not consecutively, the price of no single lot amounting to 10*l.*, the court held, that each lot

^a *Garbutt v. Watson*, 5 B. & A. 613. (7 Eng. C. L. 209.)

^b *Wilks v. Atkinson*, 6 Taunt. 11. (1 Eng. C. L. 292.)

^c *West Middlesex Water Company v. Suwercroft*, M. & M. 408.

^d *Hughes v. Breeds*, 2 C. & P. 159. (12 Eng. C. L. 71.) The point in this case was; whether it was a contract that required a stamp, and it was decided in the negative.

^e *Ante*, 1039.

^f *Pickering v. Appleby*, 2 P. Wms. 307. See *Bull v. Dodson*, Cas. temp. King, 41.

^g *Kenworthy v. Scholefield*, 2 B. & C. 945. (9 Eng. C. L. 236.) And see *Hinde v. Whitehouse*, 7 East, 558.

^h *Simon v. Motivos*, 3 Burr. 1994.

ⁱ *Cobbold v. Caston*, 1 Bing. 399.

was a distinct contract, and therefore not within the statute.* So where the defendant purchased of a traveller of the plaintiff's a cask of cream of tartar, and offered to purchase* two chests of lac dye at a certain price, and the traveller said that the price was too low, but that if he did not write to the defendant in a day or two he might have it; the traveller did not write, but afterwards sent the cream of tartar and the lac dye; the court held, that the contracts were distinct, for it could not be considered as an entire or joint order, if as to one article the vendor was to have an option and time for consideration.^b

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But where the defendant purchased various articles at a linendraper's shop, and a separate price was agreed upon for each, no article being of the price of 10*l.*, and he desired an account of the whole to be sent to his house, and a bill, amounting to 70*l.*, was accordingly sent; the court held it to be one entire contract for the whole of the articles. "Had the entire value," said Bayley, J., "been set upon the whole together, there cannot be a doubt of its being a contract for a greater amount than 10*l.*, within the meaning of the seventeenth section; and I think that the circumstance of a separate price being fixed upon each article, makes no such difference as will take the case out of the operation of that law." Holroyd, J.:—"At first it appears to be a contract for goods of less value than 10*l.*; but in course of dealing, it grew into a contract for a much larger amount. At last, therefore, it was one entire contract within the meaning and mischief of the statute of frauds, it being the intention of that statute, that where the contract, either at the commencement or at the conclusion, amounted to or exceeded the value of 10*l.*, it should not bind, unless the requisites there mentioned were complied with."^c

Where *A.* agreed to supply *B.* with a quantity of turnip seed, and *B.* agreed to sow it on his own land, and sell the crop of seed produced therefrom to *A.* at 1*l.* 1*s.* the Winchester bushel; and the seed so produced, at the price agreed upon, exceeded in value the sum of 10*l.*, the court held that the contract was within the statute, and void for want of a memorandum in writing.^d A sale of goods for more than 10*l.*, by *sample in one place, to be afterwards delivered at another, is *1054 within the statute.^e

It is immaterial that the price agreed upon was enhanced by the fact, that the vendor had to incur an expense in causing the goods to be conveyed to the purchaser.^f

* *Emerson v. Heelis*, 2 Taunt. 38. *Roots v. Lord Dormer*, 4 B. & Ad. 77. (24 Eng. C. L. 29.) See *James v. Shore*, 1 Stark. 426. (2 Eng. C. L. 456.)

^b *Price v. Lea*, 1 B. & C. 156. (8 Eng. C. L. 48.)

^c *Balday v. Parker*, 2 B. & C. 37. (9 Eng. C. L. 16.)

^d *Watts v. Friend*, 10 B. & C. 446. (21 Eng. C. L. 109.)

^e *Cooper v. Elston*, 7 T. R. 14. • ^f *Astey v. Emery*, 4 M. & S. 262.

SECTION XV.

DELIVERY AND ACCEPTANCE.

THE words of the seventeenth section are, "except the buyer shall accept part of the goods so sold, and actually receive the same." To satisfy this requisite, two facts are necessary—a delivery by the vendor with the intention of transferring the possession, and an acceptance by the vendee with an intention of taking to that possession as owner;^a and therefore there must be an actual delivery. A delivery in law, though it might enable the vendor to maintain an action as for goods sold and delivered, is not a sufficient compliance with this provision, unless there be a delivery in fact. (1)

Delivery
to a carrier
is not suf-
ficient.

Thus, though it is settled that delivery to a carrier, to be conveyed to a vendee, is at law a delivery to all intents and purposes, save as to the vendor's right of stoppage *in transitu*, so as to enable the latter to maintain an action for goods sold and delivered against the vendee;^b yet it is now established, (though formerly it was considered otherwise,^c) that such delivery is not a sufficient compliance with the above requisite.^d

The result of the cases on this subject appears to be, that so long as the vendor has control over the goods, so as to retain his lien for the price, or so long as the vendee can object to their quantity or quality, there can be no acceptance within the *meaning of the statute. The following cases will illustrate this position.

*1055

Where the vendee verbally agreed at a public market, with the agent of the vendor, to purchase twelve bushels of tares, (then in the vendor's possession, constituting part of a larger quantity in bulk,) to remain in the vendor's possession till called for; and the agent on his return home measured the twelve bushels, and set them apart for the vendor; held, that this did not amount to an acceptance; for if the vendee had gone to the vendor's granary after the sale, and upon inspection discovered that the tares did not correspond with the sample, he might have objected to them, and if so, there could not have been any previous acceptance.^e So where *A.*, a merchant in

^a See *Phillips v. Bistolli*, 2 B. & C. 513, (9 Eng. C. L. 162,) *post*.

^b See *Dawes v. Peck*, 8 T. R. 330, and other cases under the title "Carrier," *ante*, 531, *et seq*.

^c *Hart v. Sattley*, 3 Camp. 528, where it was held that a delivery on a *parol order* to a carrier, was a delivery to the vendee.

^d *Hanson v. Armitage*, 5 B. & A. 557. (7 Eng. C. L. 191.) *Nicholle v. Plume*, 1 C. & P. 272. (11 Eng. C. L. 390.) *Howe v. Palmer*, 3 B. & A. 321. (5 Eng. C. L. 303.)

^e *Howe v. Palmer*, 3 B. & A. 321. (5 Eng. C. L. 303.) See *Smith v. Surman*, *ante*, 1040.

(1) (*Outwater v. Dodge*, 6 Wend. 397. *Franklin v. Long*, 7 Gill & Johns, 407. *Jackson v. Covert*, 5 Wend. 139. *Peltier v. Collins*, 3 Wend. 459.)

London, had been in the habit of selling goods to 'B., resident in the country, and in pursuance of a parol order from B., sent goods to a wharfinger, to be forwarded in the usual manner; the ship containing the goods having been lost; the court held, that the acceptance not being by the vendee himself, was not sufficient. *Abbott, C. J.*, having referred to the preceding case, observed, "that there could be no actual acceptance, so long as the buyer continued to have a right to object, either to the quantum or quality of the goods."^a

So where goods were bought abroad, and there delivered on board a ship chartered by the vendee; held, not a sufficient acceptance.^b So where the purchaser appointed the mode in which the goods should be conveyed, and directed a third person in whose possession the goods were to see them delivered and measured.^c So where A. agreed to purchase a horse from B., for ready money, and to take him within a time agreed upon, and about the expiration of that time, A. rode the horse and gave directions as to its treatment, &c., but requested that it might remain in B.'s possession for a further time, at the expiration of which he promised to fetch it away, and pay the price; the horse died before A. paid the price or took him away: *held, not to amount to an acceptance, for B. never parted with the possession or control; at all events he had a lien for the price.^d But where the defendant bought two horses from the plaintiff, a livery stable keeper, and desired to keep them at livery for him, whereupon the plaintiff removed them out of his sale stable into another stable; held, that the plaintiff by assenting to the defendant's order, and changing the stables in which the horses had been kept, had relinquished his lien for the price, and that he held the horses not as owner, but as any other livery stable keeper might have done, and consequently, that there was a delivery and acceptance.^e

*1056

Where goods to the value of 144*l.* were made pursuant to order, but continued, by the desire of the vendee, upon the premises of the vendor, excepting a part to the value of 2*l.* 10*s.* which the former took away; held, that there was no delivery and acceptance of the rest of the goods within the meaning of the statute.^f

When the facts and intention of the parties are ascertained, it is for the court to decide whether, in law, they constitute an

^a *Hanson v. Armitage*, 5 B. & A. 557. (7 Eng. C. L. 191.) And see *Rhode v. Thwaites*, 6 B. & C. 392, (13 Eng. C. L. 206.) *post*, 1058.

^b *Acebal v. Levy*, 10 Bing. 376. (25 Eng. C. L. 170.)

^c *Astey v. Emery*, 4 M. & S. 262. See *Anderson v. Hodgson*, 5 Price, 630.

^d *Tempest v. Fitzgerald*, 3 B. & A. 680. (5 Eng. C. L. 419.) See also *Carter v. Toussaint*, 5 B. & A. 855, (7 Eng. C. L. 280,) where, by the vendee's direction, the horse was fired and sent to grass, but entered as the property of the vendor.

^e *Elmore v. Stone*, 1 Taunt. 458. The authority of this decision was doubted by *Bayley, J.*, in *Howe v. Palmer*, 3 B. & A. 324, (5 Eng. C. L. 303,) and by *Best, C. J.*, in *Proctor v. Jones*, 2 C. & P. 534. (12 Eng. C. L. 248.)

^f *Thompson v. Maceroni*, 4 D. & R. 619. 3 B. & C. 1. (10 Eng. C. L. 3.)

*1057

acceptance; but when those are disputed, it is a question for the jury whether there has been a delivery and acceptance in point of fact.^a Where, by one of the printed conditions in a catalogue of a sale by auction, the purchaser was to pay 30% per cent. upon being declared the highest bidder, and the residue before the goods were removed; and a person attended such sale, bid for a lot, and having been declared the "highest bidder, the article was immediately delivered to him, but in a few minutes afterwards he returned it, stating that he had been mistaken in the price, and refused to take it, and no part of the price for which it was knocked down having been paid; held, that it was a question of fact for the jury, whether there had been such a delivery by the seller and acceptance of the article by the buyer, as would take the case out of the statute, so as to show that it was the intention of both parties to be bound by the sale, no deposit upon the price having been made by the vendee, agreeably to one of the printed conditions in the catalogue.^b In an action for the price of a fire-engine sold by the plaintiff to the defendant, the defendant pleaded the statute of frauds, and the plaintiff replied, that the defendant had accepted the goods. It appeared that the defendant, after the sale of the fire-engine to him by the plaintiff, had taken a person to look at it, and had mentioned who were likely to want to buy it, and that to another person the defendant said, "I know that I am going to do it," and that to a third he said, "I have a concern in the engine;" held, that it was for the jury to consider on this evidence whether the defendant had treated the fire-engine as his, and dealt with it as such, for that, if so, the plaintiff was entitled to a verdict.^c Where the plaintiff built a wagon for the defendant, and the latter employed a smith to affix thereon the iron work, and a tilt maker to put on a tilt, the wagon remaining in the possession of the plaintiff; held, not to amount to an acceptance of the wagon by the defendant. "But," said Tindal, C. J., "it might have been otherwise if these acts had been done after the wagon was completed."^d

Marking
the goods

It has been held, that the marking by the vendee of goods in the shop of a linendraper,^e and the cutting by the vendee of

^a Where in an action for goods sold and delivered, it appeared that the defendant, having purchased a stack of hay by parol, sold part of it to a third person, by whom it was taken away, without the consent of the vendor; it having been left to the jury whether there had been an acceptance by the defendant, they found a verdict for the plaintiff. On a motion for a new trial, on the ground that the judge had left a matter of law as a fact for the jury, the court said, that the specific finding by the jury, that there was an acceptance, put an end to the question of law. *Chaplin v. Rogers*, 1 East, 192.

^b *Phillips v. Bistolli*, 3 D. & R. 822. 2 B. & C. 511. (9 Eng. C. L. 162.) See *Blenkinsop v. Clayton*, 7 Taunt. 597. (2 Eng. C. L. 230.)

^c *Bains v. Jevans*, 7 C. & P. 288. (32 Eng. C. L.)

^d *Maberley v. Sheppard*, 10 Bing. 99. (25 Eng. C. L. 42.)

^e *Hodgson v. Le Brett*, 1 Camp. 233.

wine, of the spills by which it was tasted,* amounted to an acceptance; but the contrary has been held in a more recent case, where the defendant went into the shop of the plaintiff and purchased *various articles, some of which he marked with a pencil, others were measured in his presence, and others he assisted to cut from larger bulks; held, that there was no acceptance of the goods, to take the case out of the statute. "As long," said Holroyd, J., "as the vendor preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute." Where the vendor of goods delivered to the vendee a delivery order, directed to the warehouseman in whose possession the goods were; it was held to constitute an acceptance.^c But, in a recent case, the court decided that the acceptance of a delivery order, was not equivalent to an actual acceptance, until the person who had possession of the goods had accepted the order for delivery, and thereby assented to hold the goods as the agent of the vendee.^d

When the defendant purchased hops by sample, and the bulk, samples and invoice were sent to him by the coach, pursuant to the contract, but he returned them as not answering the samples by which he bought; the jury found, in an action for the price of the hops, that the samples did answer the contract; held, that there was *no acceptance* of the goods within the statute.^e

An acceptance of part of the goods is a sufficient compliance with the statute. *A.* having in his warehouse a quantity of sugar, in bulk more than sufficient to fill twenty hogsheads, agreed to sell twenty hogsheads to *B.*, but there was no note in writing of the contract sufficient to satisfy the statute of frauds; four hogsheads were delivered to and accepted by *B.*; *A.* filled up and appropriated to *B.* sixteen other hogsheads, and informed him they were ready, and desired him to take them away; *B.* said he would take them away as soon as he could; held, that the appropriation having been made by *A.*, and assented to by *B.*, the property in the sixteen hogsheads thereby passed to the latter, and that their value might be recovered by *A.* under a count for goods bargained and sold.^f If a sample

* *Anderson v. Scott, id. n.* See *Stoveld v. Hughes*, 14 East, 308.

^b *Baldev v. Parker*, 2 B. & C. 37, (9 Eng. C. L. 16,) *ante*, 1053. See also *Proctor v. Jones*, 2 C. & P. 532. (12 Eng. C. L. 248.)

^c *Searle v. Keeses*, 2 Esp. 598.

^d *Bentall v. Burn*, 3 B. & C. 423. (10 Eng. C. L. 138.)

^e *Johnson v. Dodgson*, 2 Mees. and Wels. 653.

^f *Rhode v. Thwaites*, 6 B. & C. 388. (13 Eng. C. L. 206.) In this case Bayley, J., said, "where a man sells part of a large parcel of goods, and it is in his option to select part for the vendee; as soon as he appropriates part for the benefit of the vendee, the property in the thing sold passes to the vendee, although the vendor is not bound to part with the possession until he is paid the price." Holroyd, J., said, "that the selection made by the plaintiff, and the adoption of that act by the defendant, rendered the goods the property of the latter, subject to the vendor's lien as to the price." This case was decided on the ground that it was an acceptance within the statute, yet see *ante*, 1056, n. ⁴.

Taking a sample. *be taken as part of the commodity purchased, it is a sufficient acceptance within the meaning of the statute; but if it be delivered as a specimen of the quality only, and be not considered as part of the bulk sold, it is not a sufficient acceptance.^a

SECTION XVI.

EARNEST.

It is laid down in Blackstone's Commentaries, that if any part of the price is paid down, if it is but a penny, or any portion of the goods is delivered by way of *earnest*, it is binding.^b

Drawing the edge of a shilling across the palm of the hand is not earnest. To constitute a payment as earnest, or part payment, within the statute, there must be an actual transfer of the thing or money agreed to be so given; therefore, where the vendee drew the edge of a shilling across the palm of the vendee's hand, and afterwards returned the shilling to his own pocket, which in the North of England is called "striking the bargain," it was held not sufficient to satisfy the statute.^c

The delivery of a bill of exchange or promissory note in part payment according to agreement, would clearly be sufficient, such an instrument amounting to payment till dishonored.

SECTION XVII.

NOTE OR MEMORANDUM IN WRITING.

No particular form of words is necessary to satisfy this requisite; the statute only requires written evidence of the bargain. The memorandum should, however, specify the article sold, the price, if any be agreed upon, and the names of the contracting parties.^d

The consideration need not be expressed in the note. Where the memorandum was in these words, "we agree to give Mr. E. 19*d.* per lb. for thirty bales of cotton, customary allowance cash, 3 per cent., (signed *Matthews and Turnbull*;" it was held sufficient within the meaning of the statute though no consideration was expressed for the promise, the court considering that the word "*bargain*," used in the 17th

^a Cooper v. Elston, 7 T. R. 14. Hinde v. Whitehouse, 7 East, 558. Talver v. West, Holt, 178. (3 Eng. C. L. 66.)

^b 2 Bla. Com. 447.

^c Blenkinsop v. Clayton, 7 Taunt. 597. (3 Eng. C. L. 230.)

^d Champion v. Plumer, 1 N. R. 262.

sec. had not the same technical signification as the word "agreement," in the 4th. "The words of the statute are satisfied," said Lord Ellenborough, "if there were some note or memorandum in writing, of the bargain signed by the parties to be charged therewith; and this was a memorandum of the bargain, or at least of so much of it as was sufficient to bind the parties to be charged therewith, and whose signatures to it was all that the statute required."^a

Where the traveller of the plaintiff, a hop merchant, agreed with the defendant for the sale of a quantity of hops by sample and the defendant wrote in his book the following memorandum; "Sold *J. D.* (the defendant) twenty-seven pockets of hops at 103s., the bulk to answer the sample; samples and moneys to be sent per Rockingham coach," &c.; this was signed by the traveller on behalf of the plaintiff; held, a sufficient memorandum in writing of a contract within the statute of frauds, for it contained all the terms of the contract, the defendant's name in his own handwriting, and was signed by the plaintiffs through their agent.^b

Where in an action for the price of horses, the memorandum of the bargain did not state the price, in consequence of which the plaintiff was nonsuited; on a motion to set the nonsuit aside, the court said, that the price agreed to be paid constituted a material part of the bargain. If it were competent to a party to prove, by parol evidence, the price intended to be paid, it would let in much of the mischief which it was the object of the statute to prevent.^c

But as the statute only requires a note or memorandum of the bargain, that is, of the terms on which the parties contract, a memorandum is good, though no mention be made therein of the price; provided no price be stipulated for. As where the defendant gave an order to build a new, fashionable and handsome landaulet, &c.; it was held, that a note containing the terms of the order without mentioning the price, was sufficient to satisfy the provisions of 9 Geo. IV, c. 14, s. 7. But if any specific price had been agreed upon, the court said, that the note would not be sufficient, and that where the parties were silent as to price, the law would infer that they intended to sell and buy at a reasonable price.^d

*The whole of the terms of the contract need not be comprised in one document; it is sufficient under this section, as under the fourth, if the terms can be collected from several distinct writings containing internal references to one another.

Memorandum in writing.

It should contain the price.

If no price be stipulated for, the memorandum need not mention a price.

*1061 If the term of the contract be comprised

^a *Egerton v. Mathews*, 6 East, 307. But the consideration appeared in this memorandum by the necessary inference.

^b *Johnson v. Dodgson*, 2 Mees. & Wels. 653.

^c *Elmore v. Kingscote*, 5 B. & C. 583. (19 Eng. C. L. 327.) A mere proposal of sale, or purchase, is not sufficient. Prec. Ch. 27.

^d *Hoadley v. Maclaine*, 10 Bing. 487. (25 Eng. C. L. 208.) 4 M. & Scott, 340. See also *Acebal v. Levy*, 10 Bing. 384. (25 Eng. C. L. 170.) 4 M. & Scott, 217.

in several distinct writings, it will be sufficient.

Thus, an order for goods signed by the vendor in a book of the vendee may be connected with a letter of the vendee to his agent mentioning the name of the vendor, and with a letter of the vendor to the vendee claiming the performance of the order to constitute a complete contract.^a So, a bill of parcels in which the vendor's name is printed, may be connected with a subsequent letter from the vendor to the vendee.^b

Where the purchaser of flour gave a notice in writing to the seller, who had delivered part of it, that it was of a bad quality and unsaleable, and required him to take it away, and in which notice the quantity, quality, price, and time of delivery were stated; and the attorney for the vendor answered the notice, stating that the latter had performed his contract as far as it had gone, and was ready to complete the remainder; held, that these two documents were a sufficient memorandum or note in writing of the contract, to satisfy the terms of the statute.^c

So, where goods were sold by auction to an agent, and the auctioneer wrote the initials of the agent's name, together with the prices opposite the lots purchased by him, on the printed catalogue, and the principal afterwards in a letter to the agent recognised the purchase; held, that the entry in the catalogue and the letter, coupled together, were a sufficient memorandum of the contract within the statute.^d

But where there was a defective memorandum of the bargain, and the vendee wrote a letter recognising the order, but at the same time insisting that the terms of it had not been performed, inasmuch as the goods had not been delivered in time held, not sufficient to supply the defects of the memorandum.^e So, where the letter stated that the goods had not arrived, and that if they did not arrive in a few days, the defendant, (the vendee,) *must get them elsewhere.^f Letters offering and accepting a price, do not constitute an agreement executed in writing within the statute.^g

*1062

Where, at a public auction, the conditions of sale were read by the auctioneer before the biddings commenced, but the printed catalogue did not refer to the conditions, nor were they attached to it, and the agent of the defendant was declared the highest bidder for a lot, and the auctioneer put down the price 100 guineas, and the name of the agent opposite the lot in the sale catalogue; held, that this was not a sufficient memorandum in writing of the bargain to satisfy the statute; but if the conditions of sale had been annexed to the catalogue, the putting

^a Allen v. Bennett, 3 Taunt. 169.

^b Saunderson v. Jackson, 2 B. & P. 238.

^c Jackson v. Lowe, 7 Moore, 219. S. C. 1 Bing. 9. (8 Eng. C. L. 222.)

^d Phillimore v. Barry, 1 Camp. 513, *ante*, 1048.

^e Cooper v. Smith, 15 East, 103. See Smith v. Surman, 9 B. & C. 561. (17 Eng. C. L. 443. *ante*, 1040.)

^f Richards v. Porter, 6 B. & C. 437. (13 Eng. C. L. 229.)

^g Popham v. Eyre, Loft. 786.

down the agent's name would have been sufficient to bind his principal.⁽¹⁾

SECTION XVIII.

AGENT.

THE statute requires that the note or memorandum should be "made or signed by the parties to be charged therewith, or their agents thereunto lawfully authorised." It has been established by several decisions that an auctioneer is agent for both parties; and if he writes the name of the vendee in the catalogue it will satisfy the statute provided the conditions of sale be annexed to the catalogue, or referred to thereby.^b

Who is an agent within the statute.

The agent contemplated by the statute, who may bind a defendant by his signature to the memorandum of a bargain, must be a third person, and not the other contracting party.^c Where, therefore, an auctioneer wrote the name of the defendant in his book opposite to a lot purchased; held, in an action brought in the name of the auctioneer, that such entry was not sufficient to take the case out of the statute.^d

*But where an auctioneer's clerk attended the sale, and as each lot was knocked down named the purchaser aloud, and on a sign of assent from him entered his name in a book; it was held, in an action by the auctioneer, to be a memorandum by an agent lawfully authorised; for the clerk was not identified with the auctioneer, (who sued,) and in writing down the name he was impliedly authorised by the vendee to act as his agent.^e *1062

If an agent without authority make a contract in writing for the purchase of goods by his principal, who subsequently ratifies the contract, such ratification will render a note or memorandum of the sale, signed by the agent, sufficient under the statute.^f

^a Kenworthy v. Schofield, 2 B. & C. 945. (9 Eng. C. L. 286.) 4 D. & R. 556. Hinde v. Whitehouse, 7 East, 558.

^b Kenworthy v. Schofield, *supra*. Phillimore v. Barry, *ante*, 1061.

^c Wright v. Dannah, 2 Camp. 203. See *ante*, 1050.

^d Farebrother v. Simmons, 5 B. & A. 333. (7 Eng. C. L. 120.) Rayner v. Linthorne, 2 C. & P. 124. (12 Eng. C. L. 55.)

^e Bird v. Boulter, 4 B. & Ad. 443. (24 Eng. C. L. 97.) 1 N. & M. 313. But where an auctioneer's clerk signed the contract, witness T. N., without more, it was held not to be a signing by an agent of the party. Gosbell v. Archer, 2 Ad. & Ell. 500. (29 Eng. C. L. 159.) 1 H. & W. 31. 4 N. & M. 485, *ante*, 1048.

^f Maclean v. Dunn, 4 Bing. 722. (15 Eng. C. L. 129.) 1 M. & P. 761.

(1) (A memorandum kept by a clerk of an auctioneer of the articles sold and the prices bid for them, is a sufficient note in writing to bind the vendee. *Frost v. Hill*, 3 Wend. 386.)

A broker is the agent of both parties.

A broker, also, is the agent of both parties. It is the duty of a broker to enter in a book, kept by him, a memorandum of the terms of any contract which he effects, and the names of the parties. The broker's signature to such entry is sufficient to satisfy the statute; for he is in law the agent of both parties.^a The bought and sold notes delivered to the parties constitute the contract between them, and not the entry made by the broker in his book.^b Where a broker made an entry of a contract in his book, which he omitted to sign, and sent to the respective parties bought and sold notes copied from the book and signed by him; it was held a sufficient memorandum of the bargain to satisfy the statute.^c

*1064 But if the bought and sold notes sent to the respective parties be imperfect, or if there be a variance between them, *they will not constitute a valid contract,^d nor can they be corrected by the entry made in the broker's book.^e(1)

Where *A.* agreed to buy, and *B.* to sell a quantity of "St. Petersburg clean hemp," at a certain price, through the medium of a broker, who acted as agent for both parties; the broker delivered a bought note to *A.*, in which by mistake he inserted "Riga Rhine hemp," instead of St. Petersburg clean hemp," and then delivered a sale note to *B.*, stated correctly according to the original contract; held, that the variance between the two notes was fatal, and therefore that *B.* could not recover in an action against *A.* for not completing the contract.^f So, where a broker employed to effect a sale of goods for his principal, made a verbal contract with the vendee, and after entering it into his own book without signing it, delivered a bought and sold note to the vendor and vendee respectively, each paper differing in its items; held, that there was no memorandum in writing of the contract to bind either.^g

In an action by the vendee on a contract made through a

^a Heyman v. Neale, 2 Camp. 337.

^b Per Lord Denman, C. J., in Hawes v. Forster, 1 M. & Rob. 368. In Grant v. Fletcher, *infra*, Abbott, C. J., said, that the entry in the broker's book was, properly speaking, the original; but in Thornton v. Meux, *infra*, he said, since that he had changed his opinion, and held, together with the rest of the court, in Goom v. Afalo, *infra*, that the copies delivered to the parties were the proper evidence.

^c Goom v. Afalo, 6 B. & C. 117. (13 Eng. C. L. 116.) Chapman v. Partridge, 5 Esp. 256. Rucker v. Cammyor, 1 Esp. 105.

^d Grant v. Fletcher, 5 B. & C. 436. (11 Eng. C. L. 265.) Thornton v. Kempster, *post*. "If the broker delivers a different note of the contract to each party contracting, there is no valid contract. There is, I believe, a case which states the entry in the broker's book to be the original contract, but it has since been contradicted. Each is bound by the note which the broker delivers, and if different notes are given to the parties, neither can understand the other." Per Gibbs, C. J., in Cumming v. Roebuck, Holt, 172. (3 Eng. C. L. 64.)

^e Thornton v. Meux, M. & M. 43. (22 Eng. C. L. 243.)

^f Thornton v. Kempster, 1 Marsh. 355. 5 Taunt. 786. (1 Eng. C. L. 265.) And see Powell v. Divett, 15 East, 29.

^g Grant v. Fletcher, 8 D. & R. 59. 5 B. & C. 436. (11 Eng. C. L. 265.)

(1) (*Peltier v. Collins*, 3 Wend. 459.)

broker, it is sufficient for the vendee to produce the bought note, handed to him by the broker, and to show the employment of the latter by the vendor. If the sold note vary from the bought note, it lies on the vendee to prove that variance by producing the sold note.*

But where a broker delivered to the vendor bought and sold notes written on one sheet of paper, and the day for payment was inserted at the end of the bought note only, but in those made out for the purchasers, the day was inserted at the end of the bought as well as of the sold note; held, that as the bought *and sold notes delivered to the vendor were both written on one sheet of paper, the whole must be considered as forming one contract; and consequently that there was no variance.^b *1065

A broker cannot, without the assent of his principal, delegate his authority. Where *A.* having goods to sell, employed a broker for the purpose, and *B.* being desirous of purchasing them, authorised the broker's salesman to offer a certain price, who in consequence brought the parties together, and who having concluded the contract, in the absence of the salesman, dictated to him the terms of it; of which he made an entry in his master's book, but did not sign it, and afterwards communicated the circumstances to the broker, who directed a clerk to enter and sign the contract in his book, and sent a sale note, signed by himself, to *A.*, but no bought note was sent to *B.*; held, that there was no note or memorandum in writing signed by an agent duly authorised, to satisfy the statute.*

SECTION XIX.

PLEADINGS.

IN declaring upon a contract within this statute, it is not necessary to allege that it is in writing; for where an act makes writing necessary to a matter where it was not so at common law, it is not necessary to state in the declaration that it was in writing, though it must be proved to have been so; but in pleading it is said to be otherwise, for if the defendant plead in bar, any agreement which is required by the statute to be in writing, as that another person, for a good consideration, promised to be answerable to the plaintiff for the debt, he must state the promise to be in writing, so that it may appear to be a contract which the plaintiff can enforce.^d

* *Hawes v. Forster*, 1 M. & Rob. 368.

^b *M'Clean v. Dunn*, 4 Bing. 792, (15 Eng. C. L. 129.) *ante*, 1063.

^c *Henderson v. Barnwell*, 1 Y. & J. 387. See *M'Clean v. Dunn*, *ante*, 1063.

^d 1 Saund. 211. *b. Id.* 276, n. 1. 2.

- Where defendant, in assumpsit, pleaded that the contract declared upon was a guarantee for the debt of another, and that
- *1066 *no memorandum thereof, stating the consideration, was, or is in writing signed by the defendant or any person authorised by him; it was held, that the plaintiff might reply, that a memorandum of agreement in writing, stating the consideration, was signed by defendant, without setting out such memorandum in the replication.^a Formerly the statute might be taken advantage of under the general issue, but since the new rules it must be specially pleaded.^b

^a *Wakeman v. Sutton*, 2 Adol. & Ellis, 78. (29 Eng. C. L. 39.) 4 Nev. & M. 114. See also *Lilly v. Hewitt*, 11 Price, 494. *Lysaght v. Walker*, 5 Bligh N. S. 1. In *Lowe v. Eldred*, 1 C. & M. 239, the contrary was decided, but that case may be considered as overruled.

^b See *Hawes v. Armstrong*, 1 Bing. N. C. 761. (27 Eng. C. L. 565.) 1 Hodges, 179. *Andrews v. Smith*, 2 C. M. & R. 627. 1 Gale, 335. 1 Ch. Pl. 909.

*CHAPTER XIV.

FRAUDULENT MISREPRESENTATION.

I. Fraudulent misrepresentation respecting the character or credit of another.	PAGE
II. Fraudulent misrepresentation respecting the subject matter of a contract.	1077

SECTION I.

FRAUDULENT MISREPRESENTATION RESPECTING THE CHARACTER OR CREDIT OF ANOTHER.

If a person makes a fraudulent misrepresentation to another of any matter that is inquired of him, in consequence of which such other person is induced to do some act, whereby he sustains an injury, an action on the case, in the nature of deceit, will lie at the suit of the party injured, against the person making the fraudulent misrepresentation.(1)

To sustain such an action, it must appear that the defendant *knew* that the representation which he made was false,* and that the plaintiff had acted on the faith of such representation.(2) If therefore it should appear, that the plaintiff was aware of the falsity of the representation, or even that he had the means of detecting it, and ascertaining the truth, and neglected to do so; or that he placed a blind or wilful confidence in a representation which was not calculated to impose on a man of ordinary prudence and circumspection, the law will afford him no relief, even though he was deceived; for it is a general rule relating to all actions for torts, and peculiarly applicable to *actions for deceit, that however culpable the conduct of the individual may have been, the law will not lend its aid to any man whom the exercise of ordinary vigilance or discretion would have protected from injury, in accordance with the maxim *vigilantibus non dormientibus jura subveniunt*.

To sustain this action the defendant must be aware that his representation was false.

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The first case on this subject is *Pasley v. Freeman*, which was an action by the plaintiffs against the defendants for fraudu-

* The representation must also be in writing. See 9 G. IV, c. 14, s. 6, *post*, 1074. On this subject, Martin's Treatise on Lord Tenterden's Act may be consulted with great advantage.

(1) (*Benton v. Pratt*, 2 Wend. 385. *Weeks v. Burton*, 7 Ver. & H. 67. A representation that a note is good is equivalent to representing that the maker is responsible. *Ibid.*)

(2) (*Case v. Boughton*, 11 Wend. 106. *Williams v. Wood*, 14 Wend. 126.)

lently misrepresenting to them the solvency of one Falch, to whom they afterwards sold goods, and who turned out to be insolvent. The plaintiffs had a verdict on the third count, which in substance stated that the defendant, knowing to the contrary, fraudulently represented to the plaintiffs that Falch was a person safely to be trusted; that in consequence of such representation, and believing it to be true, the plaintiffs sold goods on credit to Falch, and by reason of his inability to pay for them, were likely to lose their price. On a motion in arrest of judgment, the court, (Lord Kenyon, C. J., Ashhurst and Buller, Js.,) Grose, J. dissentiente, were of opinion, that upon general principles, where the act of one man was the immediate cause of loss of property to another, the law conferred on the other a right of action, unless the act committed could be justified or excused, and that here the fraudulent misrepresentation of the defendant, for which there could be no possible justification or excuse, had occasioned to the plaintiffs the loss of their goods, and consequently that the third count, which in substance stated these facts, was good.^a

It is not necessary that the representation should be made through an evil motive.

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It is not necessary, in order to sustain this action, that the defendant should derive any advantage from the false representation, or that he should have colluded with the person who did derive the advantage.^b Nor is it necessary that he should make the representation with an *intention to defraud*, though it was formerly held otherwise.^c "It is sufficient that he knew that the representation was false; for it is a fraud in law if a party makes representations which he knows to be false, and an injury ensues; although the motives from which the representations proceeded may not have been bad, the party who makes such representations is responsible for the consequences."^d

Therefore where a bill was presented for acceptance at the office of the drawee, in his absence, and A., who resided in the same house with the drawee, being assured by one of the

^a Pasley v. Freeman, T. R. 51. "I confess myself still unable to comprehend the ground on which the case of Pasley v. Freeman was decided." Per Grose, J., in Haycraft v. Creasy, 2 East, 104.

^b *Id.*

^c Ashlin v. White, Holt. 387. Scott v. Lara, Peake, 225. See Ames v. Milward, 8 Taunt. 637. (4 Eng. C. L. 234.) 2 Moore, 713. Tapp v. Lee, 3 B. & P. 367.

^d Per Tindal, C. J., in Foster v. Charles, 7 Bing. 105. (20 Eng. C. L. 64.) This was an action against the defendant for recommending an agent to the plaintiff, with a knowledge that his representation of the character of the agent was false. The jury returned a verdict for the plaintiff, with a statement, that they considered that there was no fraudulent intention on the part of the defendant, though that which he had done was a fraud in law. The court refused to enter a verdict for the defendant on this finding. In Corbett v. Brown, 1 M. & Rob. 110. 8 Bing. 35. (21 Eng. C. L. 911.) 5 C. & P. 363, (24 Eng. C. L. 362,) the same learned judge observed, "that whether or no there were any motive or intention to defraud, the false assertion of a fact which the defendant knew to be untrue amounts to a fraud in law, and all the damages which fairly and necessarily follow from the misrepresentation may be recovered."

payees that the bill was perfectly regular, was induced to write on the bill an acceptance, as by the procuration of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the latter; the bill was dishonored when due, and the indorsee brought an action against the drawee, and on proof of the above facts, was nonsuited. The indorsee then sued *A.* for falsely, fraudulently, and deceitfully representing that he was authorised to accept by procuration, and at the trial the jury negatived all fraud in fact; held, notwithstanding, that *A.* was liable. Lord Tenterden, C. J., in delivering the judgment of the court, observed that the principle of the cases of *Foster v. Charles*, and *Corbett v. Brown*,^a was well founded, and applied to the present. In those cases the representation was made *immediately* to the plaintiff, and was *intended* by the defendant to induce the plaintiff to do the act which caused the damage. Here the representation was made to *all* to whom the bill might be offered in the course of circulation, and was in fact intended to be made to *all*, and the plaintiff was one of those. And the defendant must be taken to have *intended* that all such persons should *give credit to the acceptance, and thereby act on the faith of that representation, because that, in the ordinary course of business, was its natural and necessary result. When the defendant wrote the acceptance, and thereby in substance represented that he had authority from the drawee to make it, he knew that he had no such authority. The representation, therefore, was untrue to his knowledge. The defendant no doubt believed that the acceptance would be ratified and the bill paid when due, and if he had done no more than make a statement of that belief, according to the strict truth, by a memorandum appended to the bill, he would have been blameless. But then the bill would never have circulated as an accepted bill, and it was only in consequence of the false statement of the defendant, that he actually had authority to accept, that the bill gained its credit, and the plaintiff sustained a loss. For these reasons the verdict should be for the plaintiff.^b

*1070

Where a sheriff, upon the representation of a judgment creditor, took in execution certain goods as belonging to the defendant, (the debtor,) and a third party, to whom the goods really belonged, recovered their value in an action against the sheriff; it was held, in the House of Lords, upon error from Ireland, that the sheriff might maintain an action on the case against the judgment creditor for his false representation, though it was not made fraudulently or falsely. Lord Wynford in delivering judgment said, "that a false assertion made by a party for his own benefit, of a fact not known to be true, gave

The defendant held liable, though his representation was not made fraudulently or falsely.

^a *Supra.*^b *Polhill v. Walter*, 3 B. & Ad. 114, (23 Eng. C. L. 38,) recognised in *Fresman v. Baker*, 5 B. & Ad. 797. (27 Eng. C. L. 194.)

a ground of action, if it induced another party to take a step to his prejudice."^a

It is not necessary, in order to sustain this action, that the misrepresentation should amount to a positive assertion contrary to the truth; any communication which naturally impresses the plaintiff's mind with a mistaken belief, will be sufficient.⁽¹⁾

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*Where the defendant having had a credit lodged with him by a foreign house, in favor of one *W. T.*, to a certain amount, upon an express stipulation that *W. T.* should previously lodge in his hands goods to treble the amount; and being applied to by the plaintiffs for information respecting the responsibility of *W. T.*, answered that he knew nothing of *W. T.* himself but what he had learned from his correspondent; but that he had a credit lodged with him for so much, by a respectable house at *H.* which he held at *W. T.*'s disposal, (omitting the condition,) and that upon a view of all the circumstances which had come to his (the defendant's) knowledge, the plaintiffs might execute *W. T.*'s order with safety; (viz. an order for the sale and delivery of goods on credit.) In an action on the case to recover damages incurred by the plaintiffs in consequence of having trusted *W. T.* on this representation; held, that there was a material suppression of the truth, and evidence sufficient for the jury to find fraud, although the defendant had no immediate interest in making the false representation, and though at the time when it was made, he added, that he gave the advice without prejudice to himself.^b But where the defendant, on being asked respecting the character and credit of another, said that he had been paid a debt due to himself from such person, and that he was ready to give him credit for any thing that he wanted, in consequence of which the plaintiff gave him credit; held, that an action for false misrepresentation, would not lie against the defendant, though he knew that the other had before that time been discharged under the insolvent act, and did not mention it to the plaintiff.^c

If the defendant believes the representation which he makes to be true an action will not lie.

If, however, the defendant at the time of making the representation believed what he states to be true, an action cannot be sustained against him. As where the defendant was asked by a tradesman respecting the circumstances of a Miss Robertson, and he replied "you may credit her with perfect safety, for *I know of my own knowledge* that she has been left a considerable fortune lately by her mother, and that she is in daily expectation of a much greater at the death of her grand-

^a *Humphreys v. Pratt*, 5 Bligh N. S. 154. This case came before the court on a motion in arrest of judgment, on the ground that the declaration contained no averment of fraud or knowledge of its falsehood. See *Adamson v. Jarvis*, 4 Bing. 66. (13 Eng. C. L. 343.)

^b *Fyre v. Dunsford*, 1 East 318.

^c *Gainsford v. Blackford*, 6 Price, 36. 7 *Id.* 544.

(1) (*Allen v. Addington*, 7 Wend. 1.)

*father, who has been bedridden for a considerable time. The defendant subsequently made various other assertions to the same effect, and goods to a considerable amount were supplied to Miss Robertson, on his recommendation. It afterwards turned out that Miss Robertson was a swindler. An action having been brought against the defendant for the misrepresentation, the court (Lord Kenyon, C. J., *dissentiente*) held, that as he believed the statement which he made to be true, (and that he did so was evident from his having lent Miss Robertson his acceptance to the amount of 2000*l.*.) the action could not be maintained on the ground that fraud, or an intention to deceive, was wanting; and as to the assertion respecting "his own knowledge," taking it *secundum subjectam materiam*, it could be considered to be no more than the assertion of a strong belief, founded upon what appeared to him to be reasonable and certain grounds.^a

If *A.* inquires generally of *B.* concerning the circumstances of *C.*, *A.* cannot maintain an action against *B.* for a deceitful representation upon this subject, if *C.* pays *A.* for the goods which it was in contemplation to sell when the representation was made, although *C.* becomes insolvent, and is indebted to *A.* for other goods subsequently sold. Aliter, if *A.* had inquired of *B.* whether *C.* was worthy to be trusted as a general customer, or if there had been any conspiracy between *B.* and *C.* to cheat *A.*, by paying for the first parcel of the goods.^b

*So if *A.* make an inquiry of *B.* as to the circumstances of *C.*, with respect to opening an account with him as a general customer, and *B.* fraudulently misrepresents him, in consequence of which *A.* sells *C.* goods from time to time, and is afterwards a loser by him; an action lies for the deceit, although the buyer pays for the first parcels of goods, on the purchase of which the reference is made, but the defendant is liable only within a reasonable time, and to a reasonable amount.^c *1073

But if one who has sold goods on the representation of another concerning the buyer's circumstances, afterwards tells the buyer he will sell him no greater amount without farther references, and after that entrusts him to a greater amount, the author of the misrepresentation is not liable beyond the sum

^a Haycraft v. Creasy, 2 East, 92. In Polhill v. Walter, *ante*, 1070, Lord Tenterden said, "If the defendant had had good reason to believe his representation to be true, as, for instance, if he had acted upon a power of attorney which he supposed to be genuine, but which was in fact a forgery, he would have incurred no liability, for he would have made no statement which he knew to be false; a case very different from the present, in which it is clear that he stated what he knew to be untrue, though with no corrupt motive."

^b It is observable, however, that the ground of the decision in Haycraft v. Creasy was the absence of fraud, or an intention to deceive; and that it has been held in Polhill v. Walter, Foster v. Charles, Corbett v. Brown, and Humphreys v. Pratt, *ante*, 1069, 70, that the existence of fraud, or of an evil motive, is not essential in actions of this kind. The opinion of Lord Kenyon in the present case appears to be more in consonance with the modern doctrine, than that of the rest of the court.

^c De Graves v. Smith, 2 Camp. 533.

^d Hutchinson v. Bell, 1 Taunt. 558.

due at the date of the plaintiff's declaration; for this is strong evidence to show that the plaintiff was no longer deceived by such misrepresentation.^a

Where *A.* fraudulently represented the circumstances of *B.* to be good, in order to induce *C.* to give him credit, and added "if he does not pay for the goods I will;" held, that an action might be maintained against *A.* for the misrepresentation, notwithstanding the addition of the promise; for the promise not being in writing, was not binding.^b

Where the declaration stated that the plaintiff had bought of *C.* and Son certain goods for a sum mentioned which the defendant had lent the plaintiff on his personal credit, without agreement for any lien on them in respect thereof, which sum the plaintiff paid to *C.* and Son, who accepted it in payment for the goods; yet that defendant, falsely and wrongfully pretending that he was entitled to such lien, and had a right of preventing their delivery to the plaintiff till the said loan should be paid, wrongfully and maliciously, and without reasonable or probable cause in that behalf, but under the color of the said pretended lien, ordered *C.* and Son not to deliver the said goods to the plaintiff, but to keep them till they received further orders; in consequence whereof *C.* and Son refused to deliver *them to him; plea that plaintiff never paid *C.* and Son; held, on demurrer, that the action was maintainable; for after putting the averment of payment, which had been traversed, out of consideration, it appeared sufficiently that the defendant knew that there was no agreement for a lien on the goods, and that there was no obligation on *C.* and Son to deliver the goods to the plaintiff without payment, and that their refusal so to deliver up the goods to the plaintiff arose from the defendant's statement, and the damage directly resulted from that act of his.^c

The false representation must be in writing.

By the 9 Geo. IV, c. 14, s. 6, it is enacted, "that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance, made or given, concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such person may obtain credit, money, or goods upon,"^d

^a *Id.*

^b *Hamar v. Alexander*, 2 N. R. 241.

^c *Green v. Button*, 2 C. M. & R. 707. 1 Tyr. & G. 118. 1 Gale, 349.

^d *That such person may obtain credit, money, or goods upon.*—It is evident that a mistake has occurred in transcribing this sentence on the roll; for as it now stands it is ungrammatical, a circumstance to be regretted, as it subjects the object of the framer to different interpretations, as appears from the following judicial conjecture respecting it in the case of *Lyde v. Barnard*, 1 Mees. & W. 101. 1 Gale, 388. Parke, B., "The words of the clause in question are clearly inaccurate, probably from a mistake of the transcriber into the parliamentary roll. We must make an alteration in order to complete the sense, and must either transpose some words, and read the sentence as if it were, 'to the intent or purpose that some other person may obtain money or goods upon credit,' or interpolate other words, and read it as if it were, 'to the intent or purpose to obtain credit, money, or goods on such representation.' If we assume Lord Tenterden's object to have been merely to prevent evasions of the statute of

*unless such representation or assurance be made in writing, signed by the party to be charged therewith.”^a

Where a female who kept a shop applied to the plaintiff to supply her with goods on credit, and gave a reference to the defendant, and, on application at the defendant's shop, his shopman gave such a character of the female as to induce the plaintiff to supply her with goods; the female having disposed

A party cannot be charged for having made a fraudulent

frauds, as we think it was, and use this as a key for the construction of the clause, it would induce one to prefer the former alteration, by which the clause is made clearly to apply only to cases where the purpose of the representation is to obtain personal credit for the third person. But then it would not only apply to all cases of such credit, for it would include money and goods only, not work and labor done for the third person, or houses and land let to him on the faith of such representation; which, however, are cases by no means of such frequent occurrence as transactions in money or goods. On the other hand, if we make the latter alteration, using the same key to the construction of the clause, we must reject the words ‘money or goods,’ as surplusage, as they would be included in the general word ‘credit.’ I think it highly probable that the first correction would make the clause such as Lord Tenterden originally wrote it; but whichever is adopted, I am of opinion that the statute applies only to those cases in which the representation is made relating to the trustworthiness of a third person, with the intent that he may obtain personal credit on the faith of such representation.”

Alderson, B.—“It is highly probable that the real clause, as drawn by Lord Tenterden, stood thus: ‘to the intent that such third person might obtain money or goods upon credit.’ But after all, this is only matter of conjecture, from the ungrammatical state of the sentence as it now stands.”

Lord Abinger, C. B.—“With regard to the remarks that have been made upon the introduction into the statute of the word ‘upon,’ without any grammatical relation to the other words of the sentence, I am decidedly of opinion that the word must be rejected as nonsensical, and that we cannot admit a conjectural transposition of it in order to interpret the statute. Neither do I think that either of the conjectures offered gives the most probable account for the introduction of the word. The manuscript of the clause most probably contained the word *thereupon*. On revising it, the author considered that the word was superfluous to express his meaning, and that it might possibly, if it had any effect, rather narrow its construction. He has, therefore, meant to strike it out, but has not carried his erasure with sufficient force through the latter part of the word. The word *upon* has, therefore, found its way into the print, and has escaped notice afterwards, when the bill was in the committee. The printers of bills for the two houses seldom commit an error on the side of omission. Every thing which is not beyond doubt erased in the manuscript is sure to be served up in print; and if it should afterwards escape detection in committee, finds its way upon the rolls of parliament and into the statute book.”

“The author of this statute appears to have had the statute of frauds before him. Some of his words are adopted from the statute, and where he has repudiated the words before him and adopted others, it seems to have been done with a view not to narrow but to extend his remedy to all possible cases in which litigation, fraud, or perjury, might be prevented, by requiring a written document to attest a representation or assurance concerning or relating to the conduct, character, credit, or ability of another, by means of which representation the party making it intended that other person to obtain money, goods, or credit.” Per Lord Abinger, *Id.*

“A practice of bringing actions on parol representations as to the solvency or trustworthiness of a third person, had grown up since the case of *Pasley v. Freeman*. This practice was an invasion of the statute of frauds, and Lord Tenterden I think meant to put all cases on the same footing where one, on the personal credit of another, gave personal credit to a third person, and to make it necessary that there should be a note in writing, where such credit was given on the faith of a representation, as well as where it was given on the faith of a positive promise. I consider, therefore, the mischief to be this and no more.” Per Parke, B., *id.*

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of the goods paid the produce to the defendant in discharge of a previous debt, whereupon the plaintiff brought an action for money had and received against the defendant, on the ground that the goods had been procured through his fraudulent contrivance in order that the amount should be paid to himself; held, that the representations made by the shopman respecting the female were within the 9 Geo. IV, c. 14, s. 6, and not being in writing could not be received in evidence; and, there being no evidence of fraud independently of the representation, that the action could not be maintained.^a

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Where the plaintiff, being about to advance money to Lord *Edward Thynne, on the purchase of an annuity, which was to be secured in addition to his personal responsibility, by the assignment of Lord Edward Thynne's interest in a certain fund settled at the time of his marriage, and of which the defendant with some other persons was a trustee, applied to the defendant to inform him as to the existing state of, and charges upon this fund, and the defendant wilfully and fraudulently made a false representation to him of the amount of the charge on the fund, for which misrepresentation the plaintiff brought an action which was tried before Lord Abinger; it appearing that the representation was made by parol, the plaintiff was nonsuited, on the ground that it was within the above enactment; and to be actionable, must have been in writing. On a motion to set the nonsuit aside, and grant a new trial, (the question being whether the misrepresentation was within the statute or not,) the court were equally divided; Barons Parke and Alderson were of opinion in the negative, on the ground that the statute applied only to representations respecting *personal* credit or trustworthiness, and not to representations respecting property or a particular fund, as in this case. Lord Abinger and Mr. Baron Gurney considered that it was within the statute, as it was a representation respecting the "*ability*" of Lord Edward Thynne to charge a particular fund; or to satisfy an engagement of a pecuniary nature, into which he was about to enter, and upon the faith of which he was to obtain money.^b

In this action, the party respecting whom the misrepresentation has been made is a competent witness for the plaintiff.^c Similar misrepresentations made by the defendant to other persons, are admissible in evidence to show a fraudulent connection between the defendant and the customer.^d

^a Haslock v. Fergusson, MS. K. B. T. T. 1837. 2 N. & P.

^b Lyde v. Barnard, 1 Mees. & Wels. 101. 1 Gale, 388.

^c Richardson v. Smith, 1 Camp. 277. Smith v. Harris, 2 Stark. 47. (3 Eng. C. L. 238.) Brant v. Robinson, R. & M. 48. (21 Eng. C. L. 379.)

^d Beal v. Thatcher, 3 Esp. 194. 2 Stark. Ev. 268.

*SECTION II.

FRAUDULENT MISREPRESENTATIONS RESPECTING THE SUBJECT
MATTER OF A CONTRACT.

AN action on the case also lies for the breach of an implied warranty, or for any fraud practised by a vendor in respect of the subject matter of a contract, whereby the vendee sustains a damage. As if a person sells goods as his own, knowing that they were the property of another; the vendee may maintain an action on the case in the nature of deceit against the seller, if the right owner claims the goods; for possession of a personal chattel gives a colorable title, and it is but a reasonable confidence which the buyer placed in the seller when he affirmed it to be his own; the law, therefore, will, in such cases, imply a warranty as to the right to sell.^a But if the seller were out of possession of the personal chattel at the time of the sale, an action will not lie against him though it be not his own, without an express warranty, for then there was room to question his title.^b

Where the plaintiff's father purchased of the defendant a gun *for the purpose of being used by himself and his sons*, which the defendant falsely warranted to have been made by *N.*, (a gun-maker of distinction,) and to be safe and secure, knowing at the same time that the gun was not made by *N.*, and that it was composed of inferior materials, and shortly after the purchase, the plaintiff lost his arm by the explosion of the gun while he was using it; held, that an action on the case for a fraudulent misrepresentation lay against the defendant; for he had knowingly sold the gun to the father *for the purpose of being used by the plaintiff*, and he had knowingly made a false warranty that it might be safely used, in order to effect the sale, and the plaintiff, believing the representation to be true, used the gun, whereby he sustained the damage; for unless the representation had been made, the dangerous act would not have been done; therefore, as there was fraud, and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the

An action on the case lies for deceit practised in respect of the subject matter of a contract.

Case will lie at the suit of a person injured by false misrepresentations respecting the subject matter of a contract, though he be no party to the contract, if the person making the representations contemplated

^a *Medeina v. Stoughton*, Salk. 210. B. N. P. 30. 2 Bl. Com. 451. Per Buller, J., in *Pasley v. Freeman*, 3 T. R. 57. Upon a written contract for goods of a particular sort, which the purchaser has no opportunity of inspecting, the law implies a warranty of a saleable article answering the description in the contract, but not that the goods shall correspond with a sample shown to the buyer, but not mentioned in the contract. *Girdiner v. Gray*, 4 Camp. 144.

^b B. N. P. 31. Salk. 210. If a bill is filed to compel the performance of a contract and payment of money, and the defendant puts in no answer, and is obliged to pay the money; if he afterwards discover that he was deceived in the contract, he shall not be barred from his action by having paid the money, if he comes recently after discovering the fraud. *Jendwine v. Slade*, 2 Esp. 572.

plated an injury to him.

time as one of its results, the party guilty of the fraud was responsible to the party injured, upon the principle of *Paisley v. Freeman*.^a Parke, B., in delivering the judgment of the court said, that the action would not lie if the gun had been delivered without any representation by the defendant; nor did he mean to say that an action would lie if the plaintiff had not known of and acted upon the representation, or that the defendant would be responsible to a person not within his contemplation at the time of the sale to whom the gun might have been sold or handed over; "We decide," said he, "that the defendant is responsible in this case for the consequences of his fraud, while the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased."^b

*1078

If by false and fraudulent representations, a party is induced to enter into a written agreement, and is thereby damnified, he may maintain case for the deceit, and give parol evidence of the representations, although they are not noticed in the written contract. As where the vendor of a public-house, pending his treaty, made false representations concerning the amount of the business and rent received for part of the premises, whereby the plaintiff was induced to give a larger sum for the premises; it was held, that the latter might maintain an action on the case for such false representations though they were not contained in the written contract.^c

So, where the vendor of a ship represented her to have been built in 1816, when, in fact, she had been launched a year before; held, that the vendee was entitled to recover damages, in an action on the case, as it was a false representation, although it was agreed that the ship should be taken with all faults.^d So, it was held that the purchaser of a warranted, but worthless watch, was entitled to maintain an action for deceit, although it was stipulated, that if he disliked the watch, the vendor should exchange it for one of equal value.^e

It being usual in the sale by auction of drugs, if they are sea-damaged, to express it in the broker's catalogue, and drugs which are repacked, or the packages of which are discolored by sea-water, bearing an inferior price, although not damaged: the defendants who had purchased some sea-damaged pimento, repacked it, and advertised it in catalogues which did not notice that it was sea-damaged, or repacked, but referred it to be viewed, with little facility however of viewing it: they exhibited impartial samples of the quality, and sold it by auc-

^a *Ante*, 1068.

^b *Langridge v. Levy*, 2 Mees. & Wels. 519.

^c *Dobel v. Stevens*, 5 D. & R. 490. 3 B. & C. 623. (10 Eng. C. L. 201.) *Lisney v. Selby*, Salk. 211. B. N. P. 31. *Pickering v. Dowson*, 4 Taunt. 779.

^d *Fletcher v. Bowsher*, 2 Stark. 561. (3 Eng. C. L. 475.) *Mellish v. Motteux*, Peak. 115. But see *Baglehole v. Walters*, 3 Camp. 154.

^e *Wallace v. Jarman*, 2 Stark. 162. (3 Eng. C. L. 295.)

tion; held, that this was equivalent to a sale of goods, as and for goods that were not sea-damaged, and that an action lay for the fraud.* If a merchant sell one kind of silk for another, whereby the purchaser is imposed upon in the value, this action lies although it turns out that the deceit was not in the merchant but in his factor; for he is responsible *civiliter*, although not *criminaliter*, for the deceit of his factor.^b

Where in an action on the case for a deceit, the plaintiff declared that he had employed the defendant to obtain a lease for him; that the defendant fraudulently represented that a premium *of 150*l.* was to be paid for it, whereas only 100*l.* were to be paid; by means of which fraudulent representation, the defendant obtained from him the sum of 50*l.* and converted it to his own use; held, that these allegations were sufficient, without further stating that the 50*l.* so obtained, were over and above the 100*l.* to be paid for the lease.*

*1079

But if *A.*, being possessed of a term for years, offers to sell it to *B.*, saying that a stranger would have given *A.* a certain sum of money for this term, whereas, in truth, that sum had not been offered to *A.*, an action on the case will not lie, although *B.* was, by such affirmation, deceived in the value.^c So an action on the case for a deceit cannot be maintained by the seller of his share in a trade, against the buyer, who has persuaded him to sell it, at a certain price, by a representation that certain partners, whose names he will not disclose, are to be joint purchasers, and that they will give no more, although in truth they had authorised the defendant to purchase it, doing the best he could, and although the defendant charged them with a higher price than he gave, for it was either a false representation of another's intention, or at most, a gratis dictum of the bidder, upon a matter which he was not under any legal obligation to the seller to disclose with accuracy, and on which it was the folly of the seller to rely.^e

The gist of this action is, that the plaintiff was imposed upon by the fraud of the defendant. If, therefore, it appears that the plaintiff was aware of the falsity of the representation, or if he had the full means of detecting the fraud, he cannot sustain this action; for it was in consequence of his own folly that he was defrauded. As, if a person buys a horse which the seller affirms to have two eyes, and the horse has but one eye only; or if the vendor warrants a house to be in perfect repair, which wants a roof; in such cases the defect is so obvious and visible that it is presumed the parties did not intend the warranty to apply to it; and the purchaser, unless he be blind, as quaintly remarked in the year-books, is without a remedy; for

* Jones v. Bowden, 4 Taunt. 847.

^b Hern v. Nicholls, Salk. 289. B. N. P. 31.

^c Pewtress v. Austin, 2 Marsh. 217. 6 Taunt. 522. (1 Eng. C. L. 471.)

^d 1 Roll. Ab. 101, pl. 16.

^e Vernon v. Keys, 12 East, 632, affirmed in Error. 4 Taunt. 488.

vigilantibus non dormientibus jura subveniunt. Where a false representation was made respecting the quality of goods, and the purchaser had a full opportunity to inspect them, and to ascertain the truth of the representation, and a *written contract* of sale was afterwards entered into, the terms of which had no reference to the representation; it was held that an action of deceit would not lie against the vendor for the misrepresentation.^b

Where the plaintiff bought a horse, warranted sound, by private contract, at a repository; at the time of sale there was a board fixed to the wall of the repository, having certain rules painted upon it, one of which was, that a warranty of soundness there given should remain in force at noon of the day following, when the sale should become complete, and the seller's responsibility terminated, unless a notice and surgeon's certificate of unsoundness were given in the meantime; the rules were not particularly referred to at the time of this sale and warranty; the horse proved unsound, but no complaint was made till after twelve on the following day; the unsoundness was of a nature likely not to be immediately discovered; some evidence was given to show that the defendant knew of it, and the horse was shown at the sale under circumstances favorable for concealing it; after verdict for the plaintiff; held, that there was sufficient proof of the plaintiff having had notice of the rules at the time of the sale to render them binding on him; held also, that the rule in question was such as a seller might reasonably impose, and that the facts did not show such fraud or artifice in him as would render the condition inoperative, for this was a warranty against such faults only as the purchaser might discover within twenty-four hours.^c

The misrepresentation must be false and fraudulent.

*1081 The *scienter* must be alleged and proved.

To sustain an action on the case in the nature of deceit, the plaintiff must show that the misrepresentations were not only false but fraudulent; and that a damage resulted to him from the fraud of the defendant.^d The *scienter* must be alleged in the declaration, and proved at the trial. Where the declaration alleged that the defendant had sold certain goods, as his own goods, to the plaintiff, when in truth they were the goods of another person; it was held bad for want of an averment, that the defendant sold the goods *knowing* that they were the goods of another person.^e So where the declaration stated, that the defendant being a goldsmith, and having skill in pre-

^a See *Cayley v. Merrell*, Cro. Jac. 386. Per Grose, J., in *Pasley v. Freeman*, 3 T. R. 55. *Dyer v. Hargrave*, 10 Ves. 507.

^b *Pickering v. Dowson*, 4 Taunt. 779.

^c *Bywater v. Richardson*, 3 Nev. & M. 748. 1 Adol. & Ellis, 508. (28 Eng. C. L. 135.)

^d Per Lord Ellenborough, C. J., in *Vernon v. Keyes*, 19 East, 636. "The fraud must consist in depriving the plaintiff, by deceitful means, of some benefit which the law entitled him to demand or expect." *Id.*

^e *Dale's case*, Cro. Eliz. 44. See *Freeman v. Baker*, 5 B. & Ad. 797, (27 Eng. C. L. 194,) *ante*. *Dowding v. Mortimer*, 2 East, 450, n.

cious stones, sold a stone to the plaintiff for a sum of money, affirming it to be a bezoar stone, whereas, in truth, it was not a bezoar stone; it was held ill for want of an averment that the defendant *knew* it was not a bezoar stone.^a In an action for a false and deceitful representation of the annual returns of a business sold to the plaintiff, an averment that defendant represented the returns to amount to a certain sum, is material, and must be precisely proved, notwithstanding it be laid under a *videlicet*; and a variance between the allegation and proof is a good ground of nonsuit after verdict.^b

In case against the vendor of a public-house, for fraudulent misrepresentations of the business of the house; evidence of the actual value of the premises is admissible in reduction of damages, but not as a bar to the action.^c

Where the action was for a misrepresentation of a publican's profits, and it appeared that the defendant had named his brewer, and stated that a pass book was kept of the beer and spirits; but the plaintiff made no inquiry of the brewer, nor asked for the pass book; it was held, that the omissions did not bar the action, but was proper for the consideration of the jury, on the question whether any fraud had been practised.^d

^a Chandelor v. Lopus, Cro. Jac. 4. It is observable, however, that where there is an *express* warranty, though the action be in *tort*, the *scienter* need not be averred or proved; for the breach of warranty, and not the deceit, is the gist of the action. Williamson v. Allison, 2 East, 446. *Assumpsit*, however, is the most usual form of action, where there is an express warranty.

^b Gilbert v. Stanislaus, 3 Price, 54.

^c Pearson v. Wheeler, R. & M. 303. (21 Eng. C. L. 446.)

^d Bowring v. Stevens, 2 C. & P. 337. (12 Eng. C. L. 157.)

*CHAPTER XV.

HUSBAND AND WIFE.

	PAGE
I. Of the operation of marriage on the wife's property.	
II. Of the wife's separate estate.	1086
III. Liability of the husband for the contracts of his wife	1089
IV. When a married woman is considered as a <i>feme sole</i>	1100
V. Privilege of a married woman from arrest.	1105
VI. Actions by husband and wife, and herein of their joinder	1107
VII. Actions against husband and wife; when they should be jointly sued.	1118
VIII. Of deeds of separation.	1121

SECTION I.

OF THE OPERATION OF MARRIAGE ON THE WIFE'S PROPERTY.

The husband has an absolute right in his wife's personal property. But a qualified right only in her real property.

MARRIAGE is an absolute gift to the husband of all the goods, personal chattels, and estate which the wife was actually and beneficially possessed of at that time in her own right, and of such other goods and personal chattels as come to her during the marriage.^a But to the chattels real of which the wife is or may be possessed during the marriage, the law gives to the husband a qualified title only, *i. e.* an interest in his wife's right, with a power of alienation during the coverture; if, therefore, he disposes of his wife's terms for years by a complete act in his lifetime, her right by survivorship will be completely defeated; but if he do not alien them, and he survive her, the law gives them to him, not as representing his wife, but as a marital right; no administration, therefore, is necessary to be taken out by him to her.^b

*1083 *If, however, the wife be survivor, and the terms remain in *statu quo*, she, and not her husband's next of kin, will be entitled to them; hence, it follows, that he cannot dispose of them by his will against her surviving him; for as that does not take effect until *after* his death the law takes precedence and vests the terms in the wife immediately upon the decease; but

^a Co. Litt. 300. Per Lord Tenterden, C. J., 2 B. & Ad. 453. (22 Eng. C. L. 119.) A husband is entitled to the personal property of his wife, which she acquired by living apart from him in adultery. *Agar v. Blethyn*, 2 C. M. & R. 699.

^b 1 Roll. Ab. 345. Dyer, 251. Co. Litt. 46, b. 351, a. *Doe v. Polgrean*, 1 H. Bl. 535. *Moody v. Matthews*, 7 Ves. 183. The funds of a married woman standing in the name of the accountant-general to her account, may be pledged by her husband, *Sansum v. Dewar*, 3 Russ. 91. A wife's term may be disposed of or forfeited by her husband, or taken in execution for his debt; but if not, it survives against his representatives. *Wildman v. Wildman*, 9 Ves. 177. *Murray v. Ellibank*, 10 Ves. 90.

if he happen to be the survivor, then his testamentary disposition will be good.^a Marriage, however, makes no such gift to the husband of the goods and chattels which belong to his wife in *autre droit* as executrix or administratrix; for the wife takes no beneficial interest in the property, there is none such, therefore, which the law can transfer to him.^b

With regard to the wife's personal estate and real chattels that are not in possession, but are *immediately* recoverable by action at law or suit in equity, and which are denominated *choses in action*; such as debts owing to her, obligations, contracts, arrears of rent, legacies, money in the funds, &c., marriage is only a qualified gift of them to the husband, viz., upon condition that he reduce them into possession during its continuance; for if he happen to die before his wife without having reduced such property into possession, she, and not his personal representatives will be entitled to them.^c But if the husband survive his wife, then he, as her administrator, will be entitled to all her personal estate which continued in action, or unrecovered at her death. And although he die before all such property be recovered, yet his next of kin will be entitled to it in equity.^d

The husband acquires a qualified property in his wife's *choses in action*.

As to what will be such a reduction into possession by the husband, of the wife's *choses in action*, as will defeat the wife's "right to them by survivorship, it may be observed, that a mere intention to reduce such *choses in action* into possession will not be sufficient. The acts to effect that purpose must be such as to change the property in them, or in other words, must be something to divest the wife's right, and to make that of the husband absolute; such as a judgment recovered in an action by him *alone*, or an award of execution upon a judgment recovered by him and his wife, or receipt of the money, or a decree in equity for payment of the money to him, or to be applied to his use.^e Therefore, a mere appropriation by the husband of a legacy left to his wife, by bequeathing it to his wife for life and afterwards among his children, has been held to be insufficient to change the property, for it was a *chose in action* belonging to the wife which could not be recovered except through the medium of a suit in equity, to which she must have been a party.^f(1) So, a transfer of stock into the

Reduction into possession.
*1084

^a *Id.* As to what acts of the husband will bar the wife's right of survivorship in such cases, see Roper, 168, *et seq.*

^b Co. Litt. 351. See tit. Executors and Administrators, *ante*, 974. *Betts v. Kimpton*, 2 B. & Ad. 273. (23 Eng. C. L. 71.)

^c Co. Litt. 351. *Scawen v. Blunt*, 7 Ves. 294. Stock is in the nature of a *chose in action*. Per Sir Wm. Grant, M. R., *id.* *Betts v. Kimpton*, 2 D. & Ad. 273. (23 Eng. C. L. 71.) *Gaisford v. Bradley*, 2 Ves. 675. Per Lord Tenterden, 2 B. & Ad. 452. (23 Eng. C. L. 119.)

^d 1 Roper, 205.

^e 1 Roll. Ab. 345. Co. Litt. 46, b. *Heygate v. Annesley*, Bro. C. C. 362.

^f *Blunt v. Bestland*, 5 Ves. 515. See *Houman v. Corrie*, 2 Ves. 190.

(1) ("With respect to *legacies*, I think they have been almost uniformly regarded as

wife's name, to which she became entitled during the marriage, will not be considered as a transfer to her husband.^a But a transfer into the husband's sole name will, it seems, change the property^b unless it be made to him as trustee only.^c Where *J.* purchased stock in the joint names of himself and wife, and afterwards bequeathed the same, as his property, away from his wife; it was held, that the stock became the absolute property of the wife surviving.^d

Nego-
tiable in-
struments.

So if a negotiable instrument, as a promissory note or bill of exchange, be given to the wife before or during the marriage; the *mere possession* of it by the husband will not change the property in it so as to defeat her right by survivorship, unless he recovers upon it in his lifetime; for it is *a chose in action*.^e

*1085

"So if a bond be given to the wife during the coverture." So where money was left in the hands of trustees for the benefit of the wife, and her husband made no disposition of it during his lifetime; it was held, that she was entitled to it by survivorship.^f

Mode of
defeating
a wife's
title by
survivor-
ship.

But there are other methods by law, besides *actual* reduction into possession, by which the husband is allowed to exercise his legal right over his wife's *chose in action*, and to defeat her title by survivorship;—viz., by the disposition of her *interest* in such of them as are *legally* transferrable by assignment; without any distinction whether the interest be immediate or in remainder; and the passing and extinguishment of her interest in such of them as are not assignable by release. Thus, the husband acquires such an interest in the debts due to his wife as to enable him to release them, so as to bind her.^g So also he may release all rights accruing to her during the marriage.^h He may release a legacy left to her, although she die before the time of payment arrives.ⁱ "When the wife has *any* right or duty which by *possibility* may happen to accrue during the marriage, the husband may by *release* discharge it; but where she has a right or duty, which by *no* possibility can accrue to her during the coverture, there the husband cannot release it."^k(1)

^a Wildman v. Wildman, 9 Ves. 174.

^b 1 Rep. 221.

^c Wall v. Tomlinson, 16 Ves. 413.

^d Coats v. Stevens, 1 Y. & Coll. 66.

^e Nash v. Nash, 2 Madd. 133. Richards v. Richards, 2 B. & Ad. 447. (22 Eng. C. L. 119.) In Hodges v. Beverly, Bunb. 118, and in Lightbourne v. Holyday, 3 Eq. C. Ab. 2 Mad. 135, n., it was held, that a promissory note given to a wife did not survive to her. See M'Neillage v. Holloway, 1 B. & A. 218, post, and Barlow v. Bishop, 1 East, 432.

^f Coppin v. —, 2 P. Wms. 497. Day v. Padrone, 2 M. & S. 396, n.

^g Twisden v. Wise, 1 Vern. 161.

^h 2 Roll. Ab. 210.

ⁱ Touchst. 333.

^j Anon. 2 Roll. 134. And see 10 Rep. 51, b.

^k Per Holt, C. J., 1 Salk. 327. 1 Com. 67. 1 Lord Raym. 515, 522.

chose in action, and when given to a married woman will, unless received, released, or perhaps assigned for a valuable consideration by her husband, survive to her, upon his dying before her." Per Kennedy, J., in *Wintercast v. Smith*, 4 Rawle, 182.)

(1) (Any disposition of a wife's chose in action which is substantially an assignment for

Whenever the property is so limited to the wife, that it *cannot possibly* fall into possession during the marriage, the husband has no power to dispose of it. As if a lease were made to the husband and wife for their lives, and to the *executors of the survivor*, the husband could not release or dispose of the remainder against the title of his wife surviving him; because it could not possibly come into possession during the marriage, and the wife's interest, or chance, was a mere possibility.^a

*SECTION II.

*1086

WIFE'S SEPARATE ESTATE.

THOUGH by the common law the wife is incapable of enjoying real or personal estate, separate from and independent of her husband, and though in general her property vests in the husband by the marriage, yet under certain circumstances, she may enjoy a separate property, over which her husband has no control.⁽¹⁾ As if property be vested in trustees before marriage to enable the wife to carry on business upon her sole account, and for her separate use, the disability of coverture will be so

^a 2 Roll. Ab. 48. 10 Rep. 61. Touchst. 344. And see *Belcher v. Hudson*, Cro. Jac. 222. *Gage v. Acton*, 1 Salk. 326. Hob. 216. Cro. Jac. 571.

valuable consideration, will bar her right. The assignee, however, must be a purchaser, else he will stand in the place of the husband, and failing to reduce the chose to possession in the lifetime of the husband, the wife's right will survive. In other words, the husband may sell his wife's chose in action, but cannot give it away freed from the incidents of the marriage. Per Gibson, C. J., in *Hartman v. Dowdel*, 1 Rawle, 279. On the ground that an assignment in discharge of a debt is on valuable consideration, and that an assignment as a pledge or collateral security is not, the court held in the above case that an assignment by a husband of his wife's choses in action as a collateral security, does not deprive her of the right of survivorship, in case he dies before they are reduced to possession. *Ibid.* See a very full and elaborate discussion of this doctrine in Siter's case, 4 Rawle, 468.)

(1) A separate interest in a wife in personal chattels was unknown to the common law. Like her person, her property was under the control of her husband. This strictness has been much relaxed by the decisions of the courts of equity. It is now fully established that a separate property may be held by a married woman, through the intervention of a trust, and even without the interposing office of a trustee. To exclude, however, the marital rights over her property, a clear intention in the donor, that it shall be for her separate use, must appear. No technical words are necessary to create a separate use, but adequate language must be employed, in making the gift, to manifest a decided intention to transfer a separate interest; to show that the husband was not to enjoy what the law would otherwise give him. Per Earle, J., in *Carroll v. Lea*, 3 Gill & Johns. 508.

The rule is, that the intervention of trustees to whom a devise or bequest is made for the use of a married woman is not of itself sufficient to determine it to be for her separate use. Per Kennedy, J., in *Evens v. Know*, 4 Rawle, 66.

Where a husband, immediately after the marriage, deserted his wife and married another woman and never returned to his wife or contributed in any manner to her support, it was held that personal property, acquired by her during such desertion, became her separate estate which she might dispose of by will or otherwise. *Starrett v. Wynn*, 17 Serg. & R. 130.)

through
the inter-
vention of
trustees
by mar-
riage set-
tlement.

far removed, that the transaction will be established against the husband and his creditors. In such case the trustees of the wife will be entitled to the property assigned, and to its *increase and profits*, for her sole and separate use and benefit. The law considers the wife as the agent of her own trustees, and her possession as their possession. Thus, where by a settlement before marriage, reciting an agreement, that the wife's stock in trade, &c., should be assigned to trustees for her separate use and benefit, to the intent that she might carry on the trade at her own risk and charges, and for her own separate and exclusive benefit she assigned to *A.* all her stock in trade and effects and all book debts, &c., in trust for her *separate use*; there was not any schedule of the property annexed to the deed, or referred to; after the marriage she carried on the business (of a milliner) in the same house with her husband, but in a separate apartment; he paid the rent of the house, and was at the expense of fitting up the shop; the husband having become a bankrupt; the court held, that his assignees were not entitled to her property, for *A.*, the trustee, was the real owner of it, and it was not in the order and disposition of the husband with the consent of the real owner, to make the case fall within the statute. The wife's possession of the goods was as *agent* of the trustee. And the want of a schedule to the deed, specifying the property assigned, was immaterial, for it would have

*1087

given no public notice or information, and it would have been only known to the persons interested in the settlement. So where by a settlement before marriage, thirty-two cows, &c., and the increase and produce arising therefrom, were assigned to trustees for the separate use of the wife, the husband covenanting to permit her to carry on the trade of a cow-keeper to her separate use; after marriage, the wife, with the profits of her trade, purchased four more cows; held, that the settlement was good against the creditors of the husband, and that the cows purchased after the marriage were also protected by it. With respect to the latter, Mr. Justice Buller said *it* was the same as if the wife had paid the produce arising from the original cows to the trustees, and they had purchased the other cows, for she had acted as the agent of the trustees.^b

So where a *feme sole*, who kept a horse and chaise to visit her customers, by deed conveyed to trustees "all her household furniture, goods, and chattels, (specified in a schedule, in which the horse and chaise were not included,) and all her stock in trade; and other articles belonging to her *in and about her business*; after marriage she used the horse and chaise as before; held, that the horse and chaise passed to the trustees, as belonging to her *in and about her business*, and that they

^a Jarman v. Woolloton, 3 T. R. 618.

^b Haselington v. Gill, 3 Doug. 415. (26 Eng. C. L. 171.) 3 T. R. 620, n.

were not liable to be taken in execution for the debts of her husband.^a

Regularly, when property is intended to be given or settled upon married women for their separate uses, it ought to be vested in trustees for them; but even though such precaution be not observed, still in *equity*, the intention will be effectuated, and the wife's interest will be protected by the conversion of her husband into a trustee for her.^b

A wife's property may be limited by a marriage settlement to her husband, until he becomes insolvent, and from that event, "to the wife's separate use for life." But a husband cannot before marriage, settle *his* property, so as, by express stipulation, with a view to future insolvency, to give his wife, in that event, any part of his property.^c *1088

Though in strictness a husband has no right to any of his wife's property before marriage, and in general the wife can dispose of her fortune as she pleases before that event, yet, if *after* the commencement of a treaty for marriage the wife should make a voluntary disposition of her property, *without* the *knowledge* or *concurrence* of her intended husband, such disposition will in general be void, as being a fraud on his marital rights.⁽¹⁾ But in applying the principle upon which conveyances made by the intended wife, pending a treaty of marriage, are avoided upon the ground of fraud on the marital right, the court will take into consideration the meritorious object of such conveyances, and the situation of the intended husband in point of pecuniary means. Therefore, where, pending a treaty of marriage, a conveyance was made by the intended wife as a provision for the children of a former marriage, the court refused to set it aside.^f So where a conveyance was made to a sister, and the husband was presumed to have notice of the assignment before marriage.^g But the concurrence of the husband in the settlement precludes all objection on this ground.^h

A disposition by a woman of her property, pending a treaty of marriage, in fraud of her husband, will be void as against him.

^a Dean v. Brown, 5 B. & C. 336. (11 Eng. C. L. 248.) 8 D. & R. 95. 2 C. & P. 69. (12 Eng. C. L. 30.)

^b 2 Roper, 153. Bennett v. Davis, 2 P. Wms. 316. Per Lord Eldon, in Rich v. Cockell, 9 Ves. 375. Parker v. Brook, *id.* 583.

^c Lockyer v. Savage, 2 Stra. 947. *Ex parte* Hinton, 14 Ves. 598. *Ex parte* Cooke, 8 Ves. 354.

^d Higginbotham v. Holme, 19 Ves. 88. *Ex parte* Hodgson, *id.* 206. *Ex parte* Murphy, 1 Scho. & Lef. 44. Higginson v. Kelly, 1 Rose, 369.

^e The Countess of Strathmore v. Bowes, 1 Ves. jun. 28. Howard v. Hooker, 1 Eq. Cas. Ab. 59. 2 Ch. Rep. 81. Carleton v. Dorset, 2 Ver. 17. Hunt v. Mathews, 1 Ver. 408. Goddard v. Snow, 1 Russ. 485. 1 Roper, 165, *et seq.*

^f King v. Cotton, 2 P. Wms. 674. See Newstead v. Searles, 1 Atk. 265.

^g St. George v. Wake, 1 Mylne & K. 610.

^h *Id.* Slocombe v. Glubb, 2 Bro. C. C. 545.

(1) (*Crane v. Morris's Lessee*, 6 Peters, 598.)

*SECTION III.

OF THE LIABILITY OF THE HUSBAND IN RESPECT OF THE
CONTRACTS OF HIS WIFE.

	PAGE		PAGE
1 Liability of the husband for the contracts of his wife <i>dum sola</i> .		4. Liability for contracts after separation through his misconduct.	1097
2. Liability for her contracts during cohabitation.		5. Liability of the husband for the wife's contracts when she has deserted him, or been guilty of adultery.	1098
3. Liability for her contracts after separation by mutual consent.	1094		

HAVING considered the interest which the husband acquires in his wife's property by the marriage, it is proposed to treat next of his liability in respect of her contracts; and first, as to her contracts before marriage.

A husband is liable for the contracts of his wife *dum sola*.

1.—*Liability of the husband for the contracts of his wife dum sola.*] It may be laid down as an established rule, that the husband is liable, *during the marriage*, for *all* contracts made by her *dum sola*, how improvident soever they may be, though she does not bring him a portion of one shilling; and on the other hand, that unless such contracts be enforced during the coverture, he is not *personally* responsible in respect of them, be her fortune ever so great; but if he becomes her administrator, he is chargeable in his representative capacity to the extent of her assets.^a

A husband is not liable for any contracts entered into by his wife during coverture without his assent express or implied.

2.—*Liability of the husband for the contracts of his wife during cohabitation.*] During the coverture the wife is in general incapable of acquiring any property of her own, or of binding her husband by any contract made by her without his authority, express or implied; while, however, they live together, ^aif she orders any goods, or enters into any contract for *necessaries* for herself or the family, the law will presume that in so doing she acted as his agent, and under his authority; and he will be responsible for such contracts unless he rebuts the presumption of agency by express evidence.^b The rule of law is this:—If the husband and wife live together, and the hus-

^a Bac. Ab. Baron and Feme (E.) Com. Dig. Baron and Feme (2 C.) (N.) F. N. B. 191. Heard v. Stamford, 3 P. Wms. 409. Cas. temp. Talbot, 173. 1 Roll. Ab. 351. But in an action in respect of a contract of the wife *previous to the marriage*, the husband may show, under the general issue, that at the time of the supposed contract she was the wife of another man, who is still alive. Cowly v. Robertson, 3 Camp. 438.

^b B. N. P. 134. Manby v. Scott, 1 Mod. 125. Etherington v. Parrott, 2 Lord Raym. 1006. Montague v. Benedict, 3 B. & C. 631. (10 Eng. C. L. 205.) Martin v. Withers, Skin. 348.

band will not supply her with necessaries, or the means of obtaining them, then, although she has her remedy in the Ecclesiastical Court, yet she is still at liberty to pledge his credit for what is strictly necessary for her own support. But if he provides her with necessaries, he is not bound by her contracts, unless there is reasonable evidence to show that she has made the contract with his assent. Cohabitation is presumptive evidence of the assent of the husband, but it may be rebutted by contrary evidence; and when such assent is proved, the wife is the agent of the husband duly authorised.^a Where a husband is living in the same house with his wife, he is liable to any extent for goods which *he permits* her to receive there; she is considered as his agent, and the law implies a promise on his part to pay the value.^b

Cohabitation is presumptive evidence of assent.

But to render the husband liable for goods supplied to his wife during cohabitation, without his express assent, it is necessary that the goods be supplied on the credit of the husband, and that they be necessaries suitable to his estate and circumstances.

Where the plaintiff, a milliner, supplied articles of dress to the amount of 200*l.*, in the course of six months, to the wife of the defendant, an apothecary in a country town, and it did not appear that he had any knowledge of the goods having been supplied, and the plaintiff took from the wife a promissory note, in her own name, for the amount; besides, her father had settled a former account of the same sort, which she had with the plaintiff without the knowledge of her husband, and desired the plaintiff not to give her any further credit without her husband's sanction; it was held, that the husband was not liable, as the goods were not supplied on his credit, but on that of his wife.^c So, where the plaintiff had furnished the wife of the defendant, an attorney, not in extensive practice, with fashionable dress, to the amount of 183*l.*, in about a year and a half, but debited the wife in his books, and she had partly paid for the goods by bills of exchange accepted by herself, and paid by her; it appeared that the husband had seen her wear some of the dresses; it also appeared, that when one of her acceptances became due, the plaintiff wrote her, beseeching her to provide for it, and that he made no application to the husband respecting it, and that she said in the presence of the plaintiff and the defendant, that "her husband never paid her bills, she always paid her own." Heath, J., left it to the jury to consider, whether credit had been given to the wife and not to the husband, and the jury having found a verdict for the plaintiff, the court set it aside and granted a new trial.^d So, where the husband, during his temporary absence, made an

The husband is not liable except for necessities supplied on his credit.

*1091

^a Per Bayley, J., in *Montague v. Benedict*, 3 B. & C. 635. (10 Eng. C. L. 906.)

^b Per Lord Ellenborough, C. J., in *Wightman v. Wakefield*, 1 Camp. 191.

^c *Metcalf v. Shaw*, 3 Camp. 22.

^d *Bentley v. Griffin*, 5 Taunt. 356. (1 Eng. C. L. 131.)

allowance to his wife for the supply of herself and family, and a tradesman, with notice of this, supplied her with goods, on her promising to pay him out of her allowance; held, that the husband was not liable.^a

Where the plaintiff, a jeweller, in the course of two months, supplied the defendant's wife with jewellery to the amount of 85*l.*, and it appeared that the defendant was a special pleader of a moderate income only, who lived in furnished lodgings, without a man-servant; that the wife had jewellery suitable to her condition, and that she had never worn in her husband's presence any of the articles furnished to her by the plaintiff; the court held, that the articles supplied were not necessities, and that as there was no evidence to go to the jury of any assent of the husband to the contract made by his wife, the plaintiff could not maintain an action for the amount.^b

*1092 Where a tradesman provides articles for a married woman, *it is his duty, if he wishes to make the husband responsible, to inquire if she has her husband's authority or not; for where he chooses to trust her, in expectation that she will pay, he must take the consequences if she does not. If he takes no pains to ascertain whether the necessity exists or not, he supplies the articles at his own peril; and if it turn out that the necessity does not exist, the husband is not responsible for what may be furnished to his wife without his knowledge.^c

But however low a man's circumstances may be, if he allows his wife to assume an appearance which he is unable to support, he is answerable for the consequences. When a tradesman is thereby deceived, the loss must fall upon him who connived at the deception. Whatever may be the husband's degree, he sends his wife out into the world with a credit corresponding to the rank in life in which, by his sanction, she affects to be placed; and if a man knowing that his wife has ordered goods inconsistent with his fortune, and having the power of returning, or countermanding them, he does neither, he adopts her act, and renders himself liable for them.^d

Furniture for a house may be considered as necessities, provided it is suitable to the rank and income of the wife.^e What will be considered necessities, exclusive of board and lodging, are such articles as comport with the wife's situation in life and her husband's fortune, and which are usually worn or possessed by persons in similar conditions of life.^f

When the agency of If the wife carries on business, and the husband receives the profits, the law presumes that she acts as his agent, and he is

^a *Holt v. Brien*, 4 B. & A. 252. (6 Eng. C. L. 418.)

^b *Montague v. Benedict*, 3 B. & C. 631. (10 Eng. C. L. 205.) 5 D. & R. 532.
S. P. *Seaton v. Benedict*, 5 Bing. 28. (15 Eng. C. L. 354.) 2 M. & P. 66.

^c *Per Holroyd, J.*, 3 B. & C. 637. (10 Eng. C. L. 205.)

^d *Per Lord Ellenborough, C. J.*, in *Waithman v. Wakefield*, 1 Camp. 121.

^e *Hunt v. De Blaquire*, 5 Bing. 550. (15 Eng. C. L. 535.) 3 M. & P. 108.

^f 2 Roper, 111.

liable for articles furnished in the business, though the invoices and receipts are in the name of the wife, and though she be rated to, and pay the rates and taxes.* Where a wife traded, and the husband received the profits, and she borrowed money; upon a bill filed, after his death, against the husband for the money, the lord chancellor directed an issue to try whether the money was borrowed to carry on the trade; observing that if it were, the husband would be decreed to pay it.^{b(1)}

the wife
will be
presumed.

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If the wife purchases necessities, and without the authority of her husband borrows money to pay for them, the husband will not be liable at law for the payment of the money.* But a court of equity will allow the lender of the money to stand in the place of the person who actually supplied her with the necessities, and compel the husband to pay to him the value of the articles proved to have been delivered;^d and the husband is liable at law for a loan of money to his wife made at his request.*

Money
lent to the
wife.

As cohabitation is *prima facie* evidence of the wife's authority to contract for necessities, if a man cohabits with a woman to whom he is not married, and permits her to pass as his wife, he will be liable to pay for goods furnished to her, even by a man who knew that the parties were not married.^f But where they have separated, he cannot be charged even with necessities supplied to her, if he can show that in point of fact they were not married;^g nor will his executor be liable for goods supplied to her after his death.^h But cohabitation is only presumptive evidence of the wife's authority to contract for necessities, which may be rebutted by evidence negating the husband's assent to such contracts, as by proof of *express* no-

* *Petty v. Anderson*, 3 Bing. 170. (11 Eng. C. L. 84.) 10 Moore, 577. 2 C. & P. 38. (12 Eng. C. L. 17.)

^b *Bowyer v. Peake*, 2 Freem. 215.

^c *Stone v. M'Nair*, 1 Moore, 126. (2 Eng. C. L. 166.) A count for money lent by the plaintiff to the defendant's wife without adding "at his request," is bad, even after judgment by default. *Brown v. M'Nair*, 4 Price, 48.

^d *Harris v. Lee*, 1 P. Wms. 482. Per Parker, J., in *Earle v. Peale*, 1 Salk. 387.

^e *Stevenson v. Hardie*, 2 Bl. 872.

^f *Watson v. Threlkeld*, 2 Esp. 637. *Robinson v. Mahon*, 1 Camp. 245.

^g *Munro v. De Chemant*, 4 Camp. 215.

^h *Blades v. Free*, 9 B. & C. 167. (17 Eng. C. L. 351.) 4 M. & R. 282.

(1) (If husband and wife live together, any business in which she may be engaged is presumed, unless the contrary be shown, to be conducted by her with his knowledge and as his agent. If he know that she is conducting business in his or in her own name, and do not prohibit or prevent her or make known his dissent, he is liable on such contracts as she may make, and is liable, civilly, for such frauds or other torts as she may commit in the course of such business. If the wife buy goods without the husband's knowledge, and he afterwards learns that she has purchased them, if he permit her to use them or to retain possession of them, he is liable for the price. In such a case the possession of the wife is the possession of the husband. If, when applied to for payment, he disown all participation in the business, and deny that the purchase was made on his behalf, the seller may elect to treat such disclaimer as a disaffirmance and rescission of the contract, and may retake the goods, or, if they be withheld from him, may bring trover or replevin for them. *M'Kinley v. M'Gregor*, 23 Wharton, 369.)

tice to the plaintiff or his servant not to trust the wife.^a A general or public prohibition, as notice in a newspaper, will not, however, be sufficient to discharge the husband, without proof that it reached the plaintiff.^b

- *1094 *Where the wife, without any authority from the husband, contracted with a servant by deed, it was held that the servant, having performed the services, might sue the husband in *assumpsit*, according to the terms of the deed.^c Where a wife ordered goods to be sent to her mother's, saying her husband would pay for them, which he did, and subsequently gave another similar order, the husband was held liable.^d So, if he promise to pay the debt of his wife, for which he is not otherwise liable, he will be bound by it.^e The husband is liable for expenses incurred by his wife in exhibiting articles of the peace against him, when rendered *necessary* by his conduct.^f But where the plaintiff advanced money to the wife of the defendant to enable her to prosecute her husband for an assault; it was held, that he could not recover it from the husband, for the prosecution of the husband could not be considered *necessary* for the protection of the wife, she might have exhibited articles of the peace against him as in the preceding case; as an indictment therefore was not necessary, in the absence of an express promise, the husband could not be called upon to pay the costs incurred in preferring it.^g

§.—*Liability of the husband for his wife's contracts after separation by mutual consent.*] Having discussed the liability of the husband in respect of his wife's contracts during cohabitation, we shall now consider how far he is responsible for her engagements during separation.

It is now established by a series of decisions, that a husband and wife may effect a legal and binding separation through the intervention of trustees; and that deeds of settlement made in contemplation of *immediate* separation, and agreements of separate maintenance, may be enforced in courts of law and equity.^h But a deed providing for the *future* separation of the parties, and not intended to take immediate effect, is void

^a Boulton v. Prentice, 2 Stra. 1214. Etherington v. Parrott, Salk. 118. Per Lord Eldon, in Rawlins v. Vandyke, 3 Esp. 250. 2 Stark. Ev. 392.

^b Manby v. Scott, 1 Sid. 197. Bac. Ab. Baron and Feme, H. Hinton v. Hudson, 1 Freem. 249. Child v. Hardyman, Stra. 875.

^c White v. Cuyler, 6 T. R. 176. 1 Esp. 200.

^d Fylmer v. Lynn, 4 Nev. & M. 559. (20 Eng. C. L. 397.) 1 H. & W. 59.

^e Harrison v. Hall, 1 Mood. & Rob. 185. Hornbucce v. Hornbury, 2 Stark. 177, (3 Eng. C. L. 302.) *post*, 1096, n.

^f Shepherd v. Mackoul, 3 Camp. 326. See Williams v. Fowler, M'Clel. & Y. 269.

^g Grindell v. Godman, 1 Nev. & Per. 169. 2 Har. & Wol.

^h Jee v. Thurlow, 2 B. & C. 547. (9 Eng. C. L. 174.) Waite v. Jones, 1 Bing. N. C. 656. (27 Eng. C. L. 532.) Wilson v. Mushett, 3 B. & Ad. 743. (23 Eng. C. L. 175.) Dateman v. Ross, 1 Dow. 235. Leech v. Beer, 3 Keb. 367. Worrall v. Jacob, 3 Meriv. 256. Ross v. Willoughby, 10 Price, 1.

and cannot be enforced either in law or equity.^a When, therefore, a husband and wife live apart by mutual consent, if upon separation he provide for her an allowance suitable to his fortune and rank in life, (which is a question proper for the consideration of a jury,) and afterwards pay it regularly, he will be exempt from all liability for her debts.^b (1)

And since it is the payment of the allowance which discharges him, it is immaterial whether it be secured by deed or a written agreement or not, provided it be regularly paid.^c But the mere covenant or contract of the husband to pay a separate maintenance, will not discharge his common law obligation to support his wife, or exempt him from liability for necessaries supplied to her, unless the stipulated allowance be regularly paid.^d For if he refuse to perform his covenant, the wife may be starved before redress can be obtained. The common law does not relieve any person from an obligation on the mere ground of an agreement to do something else in the place, unless that agreement be performed,^e and for similar reasons it has been held, that the husband was not discharged from liability for his wife's necessary expenses, by a separation deed, assigning her property to trustees for her separate use, when it did not appear that the trustees had given effect to the deed by taking possession.^f

If the husband and wife live separate by mutual consent, he will not be liable for her debts so long as he pays her a suitable allowance. He is liable for necessities if he does not provide a sufficient maintenance for her.

"If a separation takes place between a man and his wife in pursuance of a valid agreement, and that contains no provision for the maintenance of the wife, the husband must be liable for *necessaries provided for her; but if a provision is made, and regularly paid, he is not liable."^g Where in pursuance of articles of separation securing a maintenance for the wife, she quits her husband's house against his wishes, and continues to live apart from him, although he is willing and wishes to receive her back and provide for her in his own house, it seems that he is not liable for necessaries supplied to her.^h If a wife live

*1096

^a *Durant v. Titley*, 7 Price, 577. *Hindley v. The Marquis of Westmeath*, 6 B. & C. 200. (13 Eng. C. L. 141.) *Westmeath v. Salisbury*, 5 Bligh, N. S. 339.

^b *Todd v. Stokes*, 1 Salk. 116. *Hodgkinson v. Fletcher*, 4 Camp. 70. *Dennys v. Sargeant*, 6 C. & P. 419. (25 Eng. C. L. 465.)

^c *Hodgkinson v. Fletcher*, 4 Camp. 70.

^d *Nurse v. Craig*, 2 N. R. 148-153. *Mansfield, C. J., dissentiente.*

^e *Per Heath, J., id.*

^f *Barrett v. Booty*, 8 Taunt. 343. (9 Eng. C. L. 125.) The term "necessaries," means that which is requisite for the sustenance or protection of the wife; therefore, a counterpart of a deed of her separation is not such a necessary for the wife as to entitle her trustee to sue the husband for the costs of it. *Lad v. Lynn*, 2 Mees. & Wels. 265. 1 Mur. & Hur. 27.

^g *Per Littledale, J., in Hindley v. The Marquis of Westmeath*, 6 B. & C. 215. (13 Eng. C. L. 141.)

^h *Id.*

(1) (Where a husband professes to provide for his wife, who lives apart from him, it is incumbent upon a party who has been expressly forbidden to give credit to her, in order to render the husband liable for subsequent supplies, to show affirmatively and clearly that the husband did not supply her with necessaries suitable to her condition. *Mott v. Comstock*, 8 Wend. 544.)

apart from the husband, he will not be liable for necessities supplied to her, provided she has a sufficient separate maintenance, although no part of it is supplied by the husband.^a The question in such cases is, whether she has such means as are adequate to her support according to her situation in life.^b But if her allowance be precarious, as a voluntary pension to her from the crown during pleasure, it will not discharge the husband.^c

When the wife is not living with the husband, there is no presumption that she has authority to bind him even for necessities. It is for the plaintiff to show, that, under the circumstances of the separation, or from the conduct of the husband, she had authority.^d(1)

The husband is liable for necessities pending a suit for a divorce.

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A husband is liable for necessities provided for his wife, pending a suit in the ecclesiastical court for adultery and cruelty, and before alimony decreed, although a decree afterwards made, direct the alimony to be paid from a date anterior to the time when the necessities were furnished.^e If there be a divorce, *à mensa et thoro*, for adultery on the part of the husband, and a decree of the court to allow alimony to the wife, yet the husband will not be discharged from liability for necessities supplied to her, if he do not pay the alimony.^f If there be a decree for alimony, which afterwards becomes inoperative, and the husband still continues making the payments under it, the court will not inquire whether they be sufficient in proportion to the husband's means; for *prima facie* the amount decreed is sufficient, and the husband will not be liable for necessities supplied to the wife, if it appear that the decree would be renewed on application, for under such circumstances the payments cannot be deemed voluntary.^g

4.—*Liability of the husband for the contracts of his wife after separation through his misconduct.*] If a husband turns his wife away without sufficient cause, or if by his cruelty or ill treatment he obliges her to leave his house, he gives her

^a Clifford v. Laton, 3 C. & P. 15. (14 Eng. C. L. 188.) M. & M. 101.

^b Lidlow v. Wilmot, 2 Stark. 86. (3 Eng. C. L. 258.)

^c Thompson v. Hervey, 4 Burr. 2177. Where the wife lived apart and had a separate allowance, it was held, that the husband was liable on a promise made by him to pay a debt contracted by her. Hornbuckle v. Hornbury, 2 Stark. 177, (3 Eng. C. L. 303.) *ante*, 1094.

^d Per Abbott, C. J., in Mainwaring v. Leslie, M. & M. 18. (22 Eng. C. L. 236.) Clifford v. Laton, *id.* 101. Bird v. Jones, 3 M. & R. 121. But a man is liable to a third person for the acts of his wife, though they may be permanently living apart, unless the wife at the time was living in adultery. Head v. Briscoe, 5 C. & P. 484. (24 Eng. C. L. 419.)

^e Keegan v. Smith, 5 B. & C. 375. (11 Eng. C. L. 253.) 8 D. & R. 118.

^f Hunt v. De Blaquiére, 5 Bing. 550. (15 Eng. C. L. 535.) 3 M. & P. 108.

^g Wilson v. Smith, 1 B. & Ad. 801. (20 Eng. C. L. 486.)

(1) (A husband, being separated from his family, is bound to provide them with necessities suitable to their condition in life, and his omission to do so furnishes them with a general credit to that extent. *Kimball v. Keyes*, 11 Wend. 33.)

power to pledge his credit for necessities, and he is under a legal obligation to pay the debts which she necessarily incurs; and he cannot in such a case discharge himself either by a general or particular notice not to trust her.^a "Where a wife's situation in her husband's house is rendered unsafe from his cruelty or ill treatment, I shall rule it to be equivalent to a turning her out of the house, and that the husband shall be liable for necessities furnished to her under those circumstances."^b "If a man will not receive his wife into his house he turns her out of doors; and if he does so, he sends her with credit for her reasonable expenses."^c It is not necessary that the wife should suffer actual violence before she leaves the house; it is enough that she had reasonable ground for apprehension, or that the husband, by the indecency of his conduct precluded her from living with him;^d *as if he bring another woman under his roof, and thereby render his house an unfit residence for his wife.^e Where the circumstances justify a wife in leaving her husband, a request on his part that she should return to his protection will not determine his liability for necessities supplied to her during the separation.^f *1098

5.—*Liability of the husband for his wife's contracts when she has deserted him, or been guilty of adultery.* [If a wife improperly leave her husband *without his consent*, or if on account of adultery he turns her away, or if during separation she be guilty of adultery, he is not liable for her contracts even for necessities.^g And even where it appeared that the husband had first *misconducted* himself by committing adultery with a woman whom he brought home, and that he afterwards ill treated his wife, and turned her out of doors; and she being expelled, committed adultery, and at last offered to

A husband is not liable for necessities supplied to his wife if she has committed adultery, or if she has desert-

^a B. N. P. 135. Bolton v. Prentice, 2 Stra. 1214. Thompson v. Hervey, 4 Burr. 2174. 2 Stark. Ev. 392. Per Bayley, J., 6 B. & C. 203. (13 Eng. C. L. 146.) 3 B. & C. 635. (10 Eng. C. L. 207.) Harris v. Morris, 4 Esp. 41.

^b Per Lord Kenyon, C. J., in Hodges, 1 Esp. 441.

^c Per Lord Eldon, C. J., in Rawlins v. Vandyke, 3 Esp. 251.

^d Lidlow v. Wilmot, 2 Stark. 86. (7 Eng. C. L. 258.) Houlston v. Smith, 3 Bing. 127. (11 Eng. C. L. 64.) In this case, Gazelee, J., said, "I have always considered the law on this subject to be as laid down by Lord Kenyon, that if a man renders his house unfit for a modest woman to live in it, she is authorised to go away."

^e Aldis v. Chapman, S. N. P. 272. Yet in Harwood v. Heffer, 3 Taunt. 421, it was held, that the circumstance of the husband having placed a prostitute at the head of the table did not justify the wife's departure, so long as she could obtain support in the house.

^f Emery v. Emery, 1 Y. & J. 501.

^g Hindly v. Westmeath, (Marquis of,) 6 B. & C. 200. (13 Eng. C. L. 146.) Manby v. Scott, 1 Sid. 109. 1 Lev. 4. Hetherington v. Graham, 6 Bing. 135. (19 Eng. C. L. 30.) 3 M. & P. 399. Morris v. Martin, Stra. 647, "The ground of a husband's liability in an action for goods supplied to his wife is a supposed authority communicated to her by him; but when she improperly leaves him, that authority is determined." Per Bayley, J., in R. v. Flint, 1 B. & Ad. 229. (20 Eng. C. L. 380.)

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return home, but he refused to receive her; the court held, that the husband was not liable for necessities supplied to her after she had committed adultery.^a But if he voluntarily pardon her conduct and take her back, and afterwards turn her out, he becomes again liable.^b So, if having discovered that she had committed adultery instead of turning her out of doors publicly, he permits her to remain in possession of his house; as where the plaintiff, having discovered that his wife had carried on an adulterous intercourse with another man, quitted her, but left her in the house with two children bearing his name, without making any provision for her, and she continued to reside there *in a state of adultery; the court held that the husband was liable for necessities supplied to her under the circumstances.^c But if he turns her out on account of having committed adultery under his roof, he is not liable for necessities subsequently supplied to her;^d "and if she elopes from him, though not with an adulterer, or in an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound."^e It seems, however, that if she afterwards solicits to be received, and the husband refuses, the legal obligation revives.^f

*1099

It has been held that a man is not liable to the penalty imposed by 5 G. IV, c. 83, s. 3, for neglecting and refusing to maintain his wife, who has left him and committed adultery, although he himself has been guilty of adultery since her departure; for, if the husband is not bound to answer for his wife's contracts, or to receive her into his house, it cannot be said that he is "legally bound to maintain her;"^g "as she rendered herself unworthy of her husband's protection, she returned to the same state as if she were not married."^h If a wife be a prisoner for felony and the gaoler provides her with food, the husband may be charged for it;ⁱ but if she be kept in an improper place by the *covin* of the gaoler, the husband is not liable.^j

In an action for the arrears of an annuity which the husband covenanted with trustees, by a deed of separation, to allow his wife, the adultery of the wife after the separation has been held to be no defence; had he wished to make the non-commission

^a Govier v. Hancock, 6 T. R. 603.

^b Harris v. Morris, 4 Esp. 41.

^c Norton v. Fazan, 1 Bos. & Pul. 226. Robinson v. Greinold, 1 Salk. 119. Eyre, C. J., said, that if the husband in any other action should be able to establish the *notoriety* of his wife's situation he might defend himself. This decision proceeded on the principle, that the plaintiff, if ignorant of the circumstances under which she was living, had no means of knowing that her authority to contract as her husband's agent was withdrawn. Roper, 117, n.

^d Ham v. Toovy, S. N. P. 208.

^e Per Lord Raymond, C. J., in *childs v. Hardyman*, 2 Stra. 875.

^f Ewers v. Hutton, 3 Esp. 255.

^g R v. Flinton, 1 B. & Ad. 227. (20 Eng. C. L. 380.)

^h Per Littledale, J., *id.*

ⁱ Manby v. Scott, 1 Sid. 118.

^j Fowles v. Dinely, 2 Stra. 1122.

of adultery a condition of paying the annuity to his wife, *he *1100 should have covenanted to pay it *quam diu casta vixerit*.^a

SECTION IV.

WHEN A MARRIED WOMAN IS CONSIDERED AS A FEME SOLE.

It is now an established rule, (though formerly it was otherwise,^b) that a married woman is incapable of contracting or acting as a *feme sole*, or of suing or being sued as such, while the relation of marriage subsists, and she and her husband reside in this kingdom, even though she has a separate maintenance, whereby her husband is discharged from an obligation to maintain her,^c and even though she be divorced *à mensu et thoro*, and live apart from her husband in adultery.^d

To this general rule there are, however, some exceptions: When the husband is sentenced to transportation.
1st, where the legal existence of the husband may be considered as extinguished or suspended, as in case of transportation for life, or for a certain number of years, the wife's disabilities to contract, or to sue and be sued as a single woman, are removed.*

*Where the plaintiff's husband had been transported for *1101 seven years, and after the expiration of that time, her husband not having returned, she brought an action as a *feme sole*; the court held that the action was maintainable; Lord Alvanley, C. J., observing, "that by the record of the conviction and sen-

^a *Jee v. Thurlow*, 2 B. & C. 547. (9 Eng. C. L. 174.) *Field v. Serres*, 1 N. R. 121. *Scholey v. Goodman*, 8 Moore, 350. *Baynon v. Batley*, 8 Bing. 256. (21 Eng. C. L. 295.) 1 M. & Scott, 339. Adultery is no bar to the specific performance of marriage articles. *Sidney v. Sidney*, 3 P. Wms. 269. *Seagrave v. Seagrave*, 13 Ves. 439.

^b *Ringstead v. Lady Lanesborough*, 3 Doug. 197. (26 Eng. C. L. 75.) *Barwell v. Brooks*, Co. Bankrupt Law, 28. 31. 3 Doug. 371. (26 Eng. C. L. 148.) Cited in 1 T. R. 6. *Corbett v. Poelnitz*, 1 T. R. 5. *Derry v. The Duchess of Mazarine*, 1 Ld. Raym. 147.

^c The principle established by *Marshall v. Rutton*, is that nothing but the civil death of the husband or something tantamount, will subject the wife to liabilities as a *feme sole*. Per Tindal, C. J., in *Williamson v. Dawes*, 9 Bing. 295. (23 Eng. C. L. 280.) "Marshall v. Rutton, 8 T. R. 545, decided by the twelve judges. This decision restored what was the old established rule of law founded generally upon the relation of husband and wife, by which, with certain known specific exceptions, a married woman was incapable of suing or being sued as a *feme sole*." Per curiam, in *Boggett v. Frier*, 11 East, 303.

^d *Lewis v. Lee*, 3 B. & C. 291. (10 Eng. C. L. 84.) *Gilchrist v. Brown*, 4 T. R. 766. *Hatchett v. Baddeley*, 2 Bl. 1079. *Faithorne v. Blaquiere*, 6 M. & S. 73. *Ellah v. Leigh*, 5 T. R. 679. *Hookham v. Chambers*, 3 B. & B. 92. (7 Eng. C. L. 361.)

* *Lady Belknap's Case*, Year Book, 2 H. IV. F. 7, a. Bac. Ab. Baron and Feme, (M.) *Newsome v. Boyer*, 3 P. Wms. 37. *Weyland's Case*, Cō. Litt. 133. *Sparrow v. Caruthers*, cited in 2 Bl. 1197.

tence produced, there was conclusive evidence to support the right of action in the plaintiff as a *feme sole*, it appearing thereby that the husband had abjured the realm; and though the term of transportation had expired, if in fact he had not returned, the right of action remained; but that if the defendant meant to rely on the circumstance of the husband having returned, by which the plaintiff's right of action in her sole capacity would be at an end, the proof of that lay on the defendant.^a It has been held, that where the husband, being sentenced to transportation, remained in this country, (at the hulks,) where his wife had intercourse with him, she might be considered as a *feme sole* whilst the sentence was in force.^b

Custom of London. By the custom of London, a *feme covert* being a *sole trader*, (i. e. trading on her sole account without the interference of her husband,) may sue and be sued in the city courts, with reference to her dealings as such in the city.^c But the husband must be made a party to the suit for conformity. The wife, however, is considered as the substantial party, for if judgment be given against them, execution shall be against her only.^d But this custom does not enable her to sue or render her liable to be sued, as a *feme sole* in the courts at Westminster, though the custom may in some instances be pleaded in bar there.^e

When the husband is an alien. It has been said, that if the husband be an alien who has never been in this country, the wife residing here is responsible for her contracts as a *feme sole*.^f And where an alien having

*1102 *resided with his wife in this country, went abroad with an intention to return, but did not return, and his wife kept house in this country, Lord Kenyon held that the wife might be sued as a *feme sole*, observing that this case came within the principles of the common law, where the husband had abjured the realm.^g But this decision was disapproved of by Lord Ellenborough, in *Kay v. Duchess of Pienne*, who said that since the case of *Marshall v. Rutton*, he considered it quite clear that a married woman could not be sued as a *feme sole*, where her husband had been living with her within the realm. In that

^a *Carroll v. Blencow*, 4 Esp. 27.

^b *Ex parte Franks*, 7 Bing. 762. (20 Eng. C. L. 323.) 1 M. & Scott, 1.

^c *Bac. Ab. Baron and Feme*, (M.) ^d *Langham v. Bewell*, Cro. Cas. 67.

^e *Beard v. Webb*, in Error, 2 B. & P. 93, where the nature of this custom is fully discussed in the judgment of Lord Eldon, *Cawdell v. Shaw*, 4 T. R. 361.

^f Per Lord Ellenborough, in *Kay v. Duchess of Pienne*, 3 Camp. 124. *Duchess of Mazarine's Case*, 1 Lord Raym. 147. "There must be some misapprehension of what Lord Ellenborough said in this case, or his lordship must have been in error, for he refers to the case of *Derry v. Duchess of Mazarine*, which was the case of the wife of an *alien enemy*, who could not be in England lawfully—analogous to the case of the wife of a person transported. The cases in which the wife has been held liable, her husband being abroad, apply only where he is *civilitur mortuus*." Per Parke, B., in *Barden v. Keverberg*, 2 M. & Wels. 65.

^g *Walford v. Duchess of Pienne*, 2 Esp. 554. *Franks v. Duchess of Pienne*, *id.* 587. See *De Gaillon v. L'Aigle*, 1 B. & P. 357. But all those cases were overruled by *Marshall v. Rutton*. Per *Curiam*, in *Boggett v. Frier*, 11 East, 303. Per Tindal, C. J., in *Stretton v. Busnach*, *post*, 1103.

case, Lord Ellenborough decided that a woman, by birth an alien, whose husband, also an alien, had resided with her in this country, and having left her here, entered into the service of a foreign state, could not be sued as a *feme sole*, and the court of King's Bench confirmed his decision.^a So where the husband, who was an Englishman, took his wife and family abroad with him, and after a residence of some years there, sent them back to England, but remained himself abroad, attending to some property which he had there; it was held that the wife who resided here with her family was not liable to be sued as a *feme sole*. "There is a great difference," said Mr. Justice Heath, "between the cases of an Englishman residing abroad, leaving his wife in this country, and of a foreigner so doing. The former may be compelled to return at any time by the king's privy seal; but in the old cases of banishment and abjuration, as well as in the more modern one of transportation, the husband could not return, as it would have been contrary to law. *There is no case in which the wife has been held liable, the husband being an Englishman.*"^b

*So where the husband went to America, leaving his wife destitute in this country, and she made contracts and obtained credit as a single woman; the court held, that she could not as a *feme sole* maintain an action of trespass, for expelling her from her dwelling-house and seizing her goods.^c Where to a plea of coverture the plaintiff replied, that before the cause of action accrued, the defendant's husband became a bankrupt, absconded without appearing to his commission, and continued to reside in foreign parts; and that during all that time, the defendant had lived in this kingdom separate and apart from her husband, and carried on business as a sole trader; and that the plaintiff did not give credit to the husband, but dealt with the defendant as a *feme sole*, and that the defendant made the promises as such *feme sole*; held, that the replication was bad in substance, as it did not contain an averment that the promises were made during the absence of the husband, and because it did not state such an *involuntary absence* of the husband, as within the principles of former decisions could communicate to the wife the privileges, or affect her with the liabilities, of a *feme sole*. It alleged no more than a temporary absence.^d So, to a plea of coverture, a replication that the husband was an alien, not a subject of this country, by naturalisation or otherwise, and at the time of the contract residing in France; and that the defendant lived in this kingdom separate from her hus-

^a Kay v. Duchesse de Pienne, 3 Camp. 123.

^b Marsh v. Hutchinson, 2 B. & P. 226. Nor is she liable even though she live as a single woman. M'Namara v. Fisher, 3 Esp. 18. Farrer v. Granard, 1 N. R. 80.

^c Boggess v. Frier, 11 East, 301.

^d Williamson v. Dawes, 9 Bing. 292. (23 Eng. C. L. 280.) 2 M. & Scott, 352. Besanquet, J., said, that in this case the husband was an Englishman, which made a great difference. See what Tindal. C. J., said, ante, 1100, n.

band; that the plaintiff gave no credit to the husband, but contracted with her as a *feme sole*; rejoinder, that the husband had resided with the defendant in this country up to a certain period, when he went abroad; held, that judgment should be for the defendant, on the replication, for it did not allege that the husband had never been in this country; and the rejoinder alleged that fact.*

*1104 Result of the authorities. The result of all the *dicta* and decisions since *Marshall v. Rutton* is, that a *feme covert* cannot sue or be sued as a *feme sole* during the coverture, unless on contracts made by her whilst her husband is under sentence of transportation, or unless the husband be an alien who has *never* been in this country; and it is not quite clear that in the latter case, she would *now* be considered as a *feme sole*, where the absence of the husband would be *voluntary*, although it was so decided in the *Duchess of Mazarine's* case, which was previous to *Marshall v. Rutton*, but which was since recognised by Lord Ellenborough in *Kay v. the Duchess of Pienne*.^b But if the husband be prevented from coming to this country, as in the instance of his being an *alien enemy*, the wife will have all the privileges, and be subject to all the liabilities, of a *feme sole*.

Where the husband has been abroad and not heard of for seven years, it will be presumed that he is dead, and the wife will be considered as a *feme sole*.^c But a replication to a plea of coverture, that the plaintiff's husband had been abroad for seven years, and was not known to the plaintiff to be living within that time, has been held to be bad.^d

A judgment confessed to a *feme covert* is void, and so is her bond.^e She cannot make an attorney.^f A warrant of attorney executed by her is void, even though she be divorced *à mensa et thoro*.^g But an agreement by a wife without the knowledge of her husband to pay additional rent out of her separate property, is good in equity.^h Where a married woman, having separate property, living apart from her husband, employed the plaintiffs as her solicitors, and promised that she would pay their bills; held, that the property was liable to pay the bills.ⁱ And if a woman married *de facto* to one whom she

* *Stretton v. Busnach*, 1 Bing. N. C. 139. (27 Eng. C. L. 335.) Tindal, C. J., intimated that since *Marshall v. Rutton*, *De Gaillon v. Aigle*, 1 B. & P. 757, was not law. See *Duchess of Mazarine's Case*, *ante*, 1101.

^b *Ante*, 1101.

^c *Hopewell v. De Pinna*, 2 Camp. Doe d. Jeesson, 6 East, 80. *Roe v. Hasland*, 1 Bl. 404. The sentence of a court of competent jurisdiction annulling the marriage *ab initio*, entirely removes the incapacity of the wife, and renders her responsible, as if the marriage had never taken place. *Anstey v. Manners*, 1 Gow. 10. (5 Eng. C. L. 441.)

^d *Lake v. Ruffie*, 6 N. & M. 684. 2 H. & W. 203.

^e *Robert v. Pierson*, 2 Wils. 3.

^f *Oulds v. Sansom*, 3 Taunt. 261.

^g *Faithorne v. Blaquire*, 6 M. & S. 73.

^h *Master v. Fuller*, 1 Ves. jun. 513.

ⁱ *Murray v. Barlee*, 4 Sim. 89.

knows to have "another wife, executes a deed as his wife jointly with him, she is bound as *feme sole*.^a

A tradesman supplying a married woman living apart from her husband with furniture upon hire, does not thereby divest himself of the present right of property in such goods, inasmuch as the married woman was incapable of acquiring it by contract; for a contract, to be valid, must be binding on both parties, and as it could not be binding on the wife, it is void, and the tradesman may recover the goods in an action of trover against the sheriff, who seized them in execution for the husband's debt.^b

Under 3 & 4 W. IV, c. 74, ss. 77—91, a *feme covert*, when her husband has absconded, and has not been heard of for some time, may pass a contingent interest in freehold property.^c When the acknowledgment of a party to a fine was taken before commissioners, who knew she was a married woman, and that her husband did not concur; but the parties were living separate under a deed by which the husband covenanted not to interfere with the wife's property, the court refused to revoke the fine, but left him to his common law remedy.^d

SECTION V.

WIFE'S PRIVILEGE FROM ARREST.

If a married woman be arrested on *mesne* process, the court will discharge her on filing common bail, unless she has been guilty of fraud or deception, by holding herself out as a single woman,^e even though her husband had absconded, and the debt was incurred by her while *feme sole*.^f The bail bond will be given up to be cancelled, if her coverture is not disputed;^g nor will her subsequently giving a bill of exchange to the plaintiff in part payment vary the rule;^h and if the plaintiff

A married woman is not liable to be arrested for debt if she has not incurred it through fraud.

^a *Anstie v. Mason*, 3 Anst. 833.

^b *Smith v. The Sheriff of Middlesex*, 15 East, 607.

^c *Ex parte Gill*, 1 Bing. N. C. 168. (27 Eng. C. L. 344.) See *ex parte Thomas*, 4 M. & Scott, 331, (30 Eng. C. L. 350,) and *ex parte Shuttleworth*, *id.* n., for the circumstances under which the court will dispense with the concurrence of the husband in a conveyance of wife's land.

^d *Cheek v. Bootle*, 4 M. & Scott, 460. (30 Eng. C. L. 354.)

^e *Roberts v. Anderson*, 2 Bl. 790. *Collins v. Rowed*, 1 N. R. 54. *Waters v. Smith*, 6 T. R. 451. *Wardel v. Gouch*, 7 East, 582. *Holloway v. Lee*, 2 Moore, 211. (4 Eng. C. L. 415.) *Pritchett v. Cross*, 2 H. Bl. 17.

^f *Crookes v. Fry*, 1 B. & A. 165. *Collins v. Rowed*, 1 N. R. 54. But see *Roberts v. Mason*, 1 Taunt. 254.

^g *Freame v. Mitford*, 3 Tyr. 139. 1 C. & M. 54. *Samwell v. Jenkins*, 6 Moore, 500. (17 Eng. C. L. 53.)

^h *Id.* But if she be arrested as the drawer of a bill of exchange, the court will not discharge her on motion. *Walsh v. Gibbs*, 4 Dowl. 683.

knows that she is a married woman, it makes no difference that she represented that she had separate property.^a And where the plaintiff knowingly arrested a married woman, the court ordered him to pay the costs of the motion for her discharge.^b The court will discharge her, even though she be separated from her husband by a divorce *à mensa et thoro*.^c

But the court will not discharge a married woman on common appearance, unless her coverture be open and notorious;^d or unless the fact of her marriage be *positively* stated in the affidavit. Where it was sworn that she was married, "as by the certificate annexed will appear," it was held insufficient.^e Where a woman was arrested as drawer of a bill of exchange, at the suit of the indorsee, the court refused to discharge her on the affidavit of a *third person*, that she was a married woman.^f If a married woman obtains credit by fraud, or by representing herself as a single woman, the court will not discharge her on motion, but will leave her to her plea of coverture.^g If she be arrested along with her husband, on mesne process, she will be discharged on motion, but the husband will not be liberated without putting in bail for both.^h

*1107

*In an action against husband and wife, they may both be taken in execution; and where the wife is taken in execution, she shall not be discharged unless it appear that she has no separate property out of which the demand can be satisfied, or that there is fraud or collusion between the plaintiff and her husband, to keep her in prison.ⁱ A married woman being sued as a *feme sole* suffered judgment by default, and being taken in execution, the court refused to discharge her on motion, but left her to her writ of error, as she ought not to have suffered the plaintiff to incur the expense of executing a writ of inquiry.^j If a *feme covert* be taken in execution, under a warrant of attorney, given by her as a *feme sole*, the court will not discharge her on a summary application.^k

^a Slater v. Mills, 7 Bing. 606. (20 Eng. C. L. 256.) 5 M. & P. 603.

^b Wilson v. Serres, 3 Taunt. 307.

^c Hookham v. Chambers, 6 Moore, 265. 3 B. & B. 92. (7 Eng. C. L. 361.)

^d Pearson v. Meadow, 2 Bl. 903. Anon. Loft. 395.

^e Harvey v. Cooke, 5 B. & A. 747. (7 Eng. C. L. 250.) But see Gervas v. Bolt-
ing, 1 Price, P. C. 117.

^f Jones v. Lewis, 7 Taunt. 55. (2 Eng. L. L. 23.) 2 Marsh. 385.

^g Luden v. Justice, 1 Bing. 344. (8 Eng. C. L. 340.) 8 Moore, 346. Simon v. Winington, 1 Dowl. 16. Partridge v. Clarke, 5 T. R. 194. Pannell v. Taylor, 1 Turr. & Russ. 106. *Ex parte* Watson, 16 Ves. 266. But see Collins v. Rowed, 1 N. R. 54.

^h Cattans v. Player, 3 D. & R. 247. (16 Eng. C. L. 167.) Taylor v. Whittaker, 2 D. & R. 225. (16 Eng. C. L. 81.) "It has been the constant practice in this court, where the husband and wife are both arrested on mesne process, that the wife shall be discharged, but the husband cannot be discharged without putting in bail for both." Per Bayley, J., 1 B. & A. 165. See Coulson v. Scott, 1 Chitty, 75. (18 Eng. C. L. 33.)

ⁱ Hoad v. Mathews, 2 Dow. 149. Tidd 1026, 9th ed., recognised by Bayley, J., in Sparks v. Bell, 8 B. & C. 3. (15 Eng. C. L. 145.)

^j Moses v. Richardson, *Id.* 491.

^k Wilkins v. Wetherill, 3 B. & P. 220.

SECTION VI.

ACTIONS BY HUSBAND AND WIFE.

	PAGE		PAGE
1. Joinder of husband and wife in actions <i>ex contractu</i> .		in actions <i>ex delicto</i> .	1112
2. Joinder of husband and wife		3. Effect of joinder.	1116
		4. Consequences of misjoinder	1117

1.—*Joinder of husband and wife in actions ex contractu.*] When the husband and wife must join in an action.

IN all real actions for the lands of the wife the husband and wife must join.^a So for rent due before coverture upon a lease for life or years.^b So for injuries done to the inheritance, as by pulling down houses, &c., or where an action of covenant is necessary to compel further assurance upon a conveyance to husband and wife.^c So they must join in an action for debts, &c., which were due to the wife before marriage, and which continue unaltered.^d But if the party give a bond to the husband and wife, in respect of such debt, or if in respect of some *new consideration, as forbearance, &c., he make a written or parol promise to the husband and wife, they *may* join, or the husband may sue alone upon such new contract.⁽¹⁾ But if the bond or promise be given to the husband *alone*, he alone should sue.^f Where a bill of exchange was payable to a *feme sole*, who intermarried *before the same was due*, it was held, that the husband might sue in his own name, without joining his wife, although she had not indorsed the bill; the marriage operating as an indorsement.^g “For that which the husband

*1108

^a 1 Bulstr. 21. Com. Dig. Baron and Feme, 5.

^b 1 Roll. 348.

^c Middlemore v. Goodale, Cro. Car. 508.

^d Hardy v. Robinson, 1 Keb. 440. Milner v. Milnes, 3 T. R. 627. Rumsey v. George, 1 M. & S. 176.

^e Ankerstein v. Clarke, 4 T. R. 616. 1 Ch. Pl. 29. Per Lord Ellenborough, 1 M. & S. 180.

^f Yard v. Ellard, 1 Salk. 117. Carth, 463. Sid. 299.

^g McNeillage v. Holloway, 1 B. & A. 218. The grounds of this decision were, that a bill of exchange was a *chattel personal*, which vested absolutely in the husband by marriage, (the court observing that, if it were a *chose in action*, it would be necessary to join the wife.) But in Richards v. Richards, 2 B. & Ad. 453, (22 Eng. C. L. 119,) the court held that a *promissory note* was a *chose in action*. In Garsforth v. Bradley, *Id.* 2 Ves. 675. Lord Hardwicke says that, “where a *chose in action* comes to the wife, whether vesting before or after marriage, if the husband die in the lifetime of the wife, it will survive to the wife, with this distinction, that as to those which come during the coverture, the husband may for them bring an action in his own name, and may disagree to the interest of the wife, and that recovering in his own name is equal to reducing to possession.” As the bill did not become due *until after the marriage*, in McNeillage v. Holloway, perhaps that decision may be reconciled with the principle laid down by Lord Hardwicke, without holding a bill of exchange to be a personal chattel.

(1) (When a husband takes a joint obligation to himself and wife for a debt due to himself alone, it is a gift to the wife, who takes as a joint purchaser and by survivorship and in her own right, unless the proceeds should be wanted on a deficiency of assets for the payment of creditors or perhaps legatees. Gibson v. Todd, 1 Rawle, 455.)

may discharge alone, and of which he may make disposition to his own use, for the recovery of this, he may well have an action in his own name, without the wife."^a "In the case of a chose in action, he cannot dispose of it to his own use, but a bill of exchange is transferable by law. The marriage vested that right of transfer in the husband, and upon that the right of action is consequent."^b

The husband *must* join his wife in all actions upon bonds and other personal contracts made with the wife *before* marriage,⁽¹⁾ whether the breach were before or during the coverture; and also for rent or any other cause of action accruing before the marriage in respect of the real estate of the wife.*

*1109 But for rent or *other cause of action accruing during the marriage on a lease or demise or other contract relating to the land or other real property of the wife, whether such contract were made before or during the coverture, the husband and wife *may join, or he may sue alone.*^{d(2)} Husband and wife seised of land in right of the wife, may join in trespass for breaking and entering a close and consuming and carrying away the grass there found, because the grass is the natural produce of the earth, and continually goes with the land.⁽³⁾ In actions for a profit, &c., accruing *during coverture*, in right of the *real* estate of the wife, they may both join, or the husband may sue alone as in debt for not setting out tithes payable to the wife.^f

Where the wife is the meritorious cause of action, she may be joined. It may be laid down as a general rule, that wherever the action would survive to the wife in case the husband died, she *may* be joined.^e In debt on bond made to the wife during coverture;^h or in *assumpsit* on a promissory note given to the wife or to the husband and wife during coverture;ⁱ the husband and wife may join, or the husband may sue alone.⁽⁴⁾ So,

^a Per Doddridge, J., in *Brett v. Cumberland*, 3 Bulstr. 164, to which Coke, J., assented. Recognised by Holroyd, J., in 1 B. & A. 223.

^b Per Holroyd, J., *Id.*

^c 1 Ch. Pl. 29. Com. Dig. Bar. and Feme. V. Bac. Ab. Bar. and Feme, K. Per Lord Kenyon, in *Milner v. Milnes*, 3 T. R. 631. *Carr v. Taylor*, 10 Ves. 578. 1 Roll. Ab. 347. S. N. P. 282. B. N. P. 179.

^d Com. Dig. Bar. and Feme (I. & Y.) Aleberry v. Walby, 1 Stra. 229. 1 Ch. Pl. 31. *Dunstan v. Burweld*, 1 Wils. 224. *Beaver v. Lane*, 2 Mod. 217. Bro. Baron and Feme, pl. 23.

^e *Willey v. Hanksworth*, S. N. P. 285, cited 2 Wils. 424. Cro. Eliz. 96.

^f Com. Dig. Baron and Feme, X. *Brookes v. Sherman*, Cro. Eliz. 413.

^g *Dunstan v. Burweld*, 1 Wils. 224. Per North, C. J., in *Froodyke v. Sterling*, 1 Freem. 236.

^h *Howell v. Maine*, 3 Lev. 403. *Per curiam*, Stra. 230.

ⁱ *Philliskirk v. Pluckwell*, 2 M. & S. 393.

(1) *Moore v. Earle*, 13 Wend. 271.)

(2) (The lessee in such action is entitled to set off a demand against the husband alone, although the suit be in the names of both husband and wife. *Ferguson v. Lathrop*, 15 Wend. 625.)

(3) (An action of trespass for cutting trees on land held by husband and wife in right of the wife, may be brought by the husband alone, or by the husband and wife jointly at his election. *Allen v. Kingsbury*, 16 Pick. 235.)

(4) (It seems to be the better opinion, that a chose in action accruing to the wife during

where the husband and wife have recovered judgment on a bond made to the wife *dum sola*, they may join in an action on such judgment, or the husband may sue alone.^a In general, the wife cannot join in any action arising from a contract made subsequently to the marriage, as in case of money lent, goods sold, &c., for she can have no property in money or goods.^b But where a promise is made to the wife alone; or to the husband and wife; and where the consideration moves wholly or in part from the wife; or where she is (as has been expressed) the "*meritorious* cause of action, as in the preceding cases, she may be joined, or the husband may sue alone."^c *1110

Thus, they may join where the contract is in consideration of her personal labor or skill, as for curing a wound,^d but not unless an express promise is made to her.^e But where the wife is joined, care should be taken that the declaration do not embrace a cause of action which affords the husband *alone* a right to sue; for where the husband and wife declared upon a *quantum meruit* for a cure done by *the wife*, and another count for medicines and plasters found and provided for the defendant; upon a general demurrer it was objected that the *wife* could not join, for that she was not the *sole* cause of action, because the medicines and plasters were the *husband's own property*, and the damages could not be severed; and of that opinion was the court.^f

If in an action by husband and wife the defendant gives a *cognovit* to the plaintiffs, it is a sufficient admission of the *joint interest* of the wife.^g Where a declaration by husband and wife stated *an agreement between the plaintiffs and the defendant*, whereby the defendant *undertook and promised*, in consideration that the plaintiffs would not enter up judgment, &c., until a certain day, &c.; held, on motion in arrest of judgment after verdict for the plaintiffs, that as the agreement was stated to be *with* the plaintiffs, the promise must be taken, after verdict, to have been made *to* them, and though the

^a Woolverston v. Fynnimore, S. N. P. 288, cited in 4 B. & Ad. 741. (24 Eng. C. L. 148.)

^b Bidgood v. Way, 2 Bl. 1236. Com. Dig. Baron and Feme, (W.) Abbot v. Blofield, Cro. Jac. 644. 2 Roll. 237.

^c "As to a wife being the meritorious cause of action, there are many cases where she is the groundwork of the action; and yet, not properly the meritorious cause. In an action for recompense due to her, for instance, as a nurse, she is so; but it is different in a case like that of the dippers at Tunbridge Wells, (Weller v. Baker, 2 Wils. 414,) where the action was in respect of a vested interest in the wife." Per Littledale, J., in Saville v. Sweeney, 4 B. & Ad. 523. (24 Eng. C. L. 108.)

^d Brashford v. Buckingham, Cro. Jac. 77. 205. Fountain v. Smith, 1 Sid. 128. Holmes v. Wood, 1 Barnard, 75, cited in 2 Wils. 424.

^e Buckley v. Collier, 1 Salk. 114. Carth. 251. King v. Basingham, 8 Mod. 199.

^f Holmes et Uxor v. Wood, cited in 2 Wils. 424; noticed by Bayley, J., in 2 M. & S. 396.

^g Nurse v. Wills, 4 B. & Ad. 739. (24 Eng. C. L. 148.) 1 Nev. & M. 765.

coverture vests absolutely in the husband, and can be sued only by him or his representatives. Cornwall v. Hoyt, 7 Conn. 420.)

agreement with the wife was void, as she was incompetent to agree in point of law, it might be rejected as surplusage, and there was a sufficient consideration for the promise moving from the wife, as well as *from the husband, namely, the forbearance and extension of time by all the plaintiffs, to support the declaration.^a

*1111

The declaration.

When the husband and wife join in an action on a promise made to them both, the declaration must distinctly disclose her interest, and show in what respect she is the meritorious cause of action; and there is no intendment to this effect.^b In case of a note or bond payable to the wife, it would sufficiently appear from the instrument itself, without further averment in the declaration, that she had a peculiar interest.^c

When the wife is executrix or administratrix.

When a wife is executrix or administratrix, as her interest is *in autre droit*, they must both join.^d But if a bond be given to husband and wife administratrix, the husband *may* sue alone.^e Where husband and wife lived separate under a deed by which he stipulated that his wife should enjoy as her separate and distinct property, all effects, &c., which she might acquire; the wife having, as *executrix* commenced an action on a promissory note against the defendants in the name of the husband and herself, the husband released the debt, which release was pleaded *puis darrien continuance*, the court on application ordered the plea to be taken off the record, and the release to be given up to be cancelled; for the husband was only named as plaintiff for conformity, and it would be a fraud on the persons having an interest under the will of the testator, if he were allowed to release the debt, though he would be entitled to intercept the money when recovered.^f Where the husband and wife lived separate, and an action was brought by the wife for a debt due to her in the name of herself and husband, without his authority, the court ordered the proceedings to be stayed until an indemnity was given to the husband.^g On giving such indemnity the wife is at liberty to go on in the husband's name.^h So where the wife brought an action for an assault on herself.ⁱ

*1112

*2.—*Joinder of husband and wife in actions ex delicto.*]

In actions *ex delicto* for injuries to the person or property of the wife committed *before* marriage when the cause of action would survive to the wife, the husband and wife *must* join; as

^a *Id.*

^b *Bidgood v. Way*, 2 Bl. 1236.

^c *Philliskirk v. Pluckwell*, 2 M. & S. 393.

^d *Com. Dig. Baron and Feme*, (V.)

^e *Ankerstein v. Clarke*, 4 T. R. 616.

^f *Innell v. Newman*, 4 B. & A. 419.

(6 Eng. C. L. 470.)

^g *Morgan v. Thomas*, 2 C. & M. 388.

2 Dowl. 332.

^h *Id.*

ⁱ *Harrison and Wife v. Almond*, 1 Harr. & W. 519. But see *Chambers v. Donaldson*, 9 East, 470, where the court refused to stay proceedings, on an affidavit of the husband, that he had not authorised his wife to bring the action; but there the husband did not ask for an indemnity.

in *trover* for a conversion of the goods of the wife *dum sola*.^a But in case of *trover* *before* marriage, and a conversion *after*, they *may* join, or the husband may sue alone.^b

The true test whether the wife is properly joined, is not whether the husband might have sued alone, but whether there is such a continuing interest in the wife, that under any state of things after the husband's death, she would have a right of action.^c Where certain household furniture was assigned by way of mortgage to the wife before her marriage by a deed annexed to which was an inventory of the furniture; the deed contained a proviso, that it should be void on payment of a certain sum before a certain period, and on payment of the interest in the mean time; the wife married before a forfeiture was incurred; in *trover* for the inventory stating that the husband and wife had been possessed of it before it came into the possession of the defendant; held, on demurrer, that they might both sue jointly, or that the husband might sue alone; for the deed only contemplated that the property in the goods should pass under certain circumstances, which might not take place until after the death of the husband; and in that case the wife and not the husband's executors would be entitled to the goods; therefore as the wife's interest might survive to her after the death of her husband, she might be joined in the action; yet as the husband was prevented by the non-possession of the inventory from reducing the goods into possession he might sue alone.^d

Where the cause of action has its inception as well as its completion after the marriage, the husband *must* sue alone, the legal interest in personalty being vested in him by the marriage.

*Therefore a declaration in *trover* at the suit of the husband and wife should state that the wife was possessed before marriage, or held the goods with him in *autre droit*; for if the declaration states that they were *both possessed* of certain goods and that the defendant converted them to *their damage*, it will be bad; for the possession of the wife is the possession of the husband, and so is the property, and therefore the conversion cannot be to the damage of the wife, but of the husband.* So, in *replevin*, unless the declaration discloses the interest of the wife when both are joined, it will be bad on demurrer;^e but after verdict, it may be presumed that the taking was before coverture, and that the plaintiffs then had a joint property, or that the wife was entitled as executrix.^f(1)

*1113

^a Com. Dig. Baron and Feme, (V.) Roll. Ab. 347. *Milner v. Milnes*, 3 T. R. 627. Cro. Car. 419. 10 Mod. 25.

^b 2 Saund. 47, h. Bac. Ab. Baron and Feme, (K.) B. N. P. 34.

^c Per Coleridge J., in *Ayling v. Whicher*, 1 Nev. & Per. 422.

^d *Ayling v. Whicher*, 1 Nev. & Per. 416.

^e 2 Saund. 47, i. *Nelthrop v. Anderson*, 1 Salk. 114.

^f *Serres v. Dodd*, 2 N. R. 405.

^g B. N. P. 53. *Bourn v. Mattaire*, *id.* S. N. P. 289. 1 Ch. Pl. 74.

(1) (*Replevin* cannot be maintained in the name of a husband and wife, to recover chattels, the property of the wife before marriage, unlawfully taken afterwards. The action must be in the name of the husband alone. *Seibert v. M'Henry*, 6 Watts, 301.)

When the action is brought for damages to the wife's land during the coverture, as in trespass for cutting down tress, they *may* both join, or the husband may sue alone.^a So, in an action on the case against a lessee for years for burning his house, where the husband has it for the life of his wife.^b So, in an action on the case for stopping a way to the wife's land,^c or for not grinding at the wife's mill;^d they may both join, or the husband may sue alone. But in detinue to recover personal chattels of the wife in the possession of the defendant before marriage, perhaps the husband may sue alone, because the law transfers the property to him, and the wife has no interest.^e Where the wife has a *vested interest*, as in the case of the dippers at Tunbridge Wells, it was held, that husband and wife might join in an action against the defendant for exercising the business of a dipper, not being duly appointed and approved according to a private statute.^f

Husband and wife must join in an action for a personal injury to the wife.

*1114

In an action in respect of a personal wrong or injury to the wife, as for the battery of the wife, the husband and wife *must* join, and the declaration ought to conclude "to their damage," and not "to the damage of the husband," for the damages will **survive to the wife if the husband die before they are recovered.** But the declaration in such case should not include a cause of action for which the husband alone ought to sue; such as expenses sustained in curing her, &c.^h

Yet where the husband and wife join in an action for a personal wrong to the wife, the husband may declare also for an injury arising solely to himself *by way of aggravation of damages*; as in an action for false imprisonment of the wife, *per quod* the business of the house remained undone; for matter may be laid for aggravation for which no action would lie.ⁱ So, the expenses incurred by the husband may be laid in aggravation.^j But the husband may bring a separate action in his own name for the loss of the assistance or society of his wife, or for any expenses occasioned by reason of a battery, false imprisonment, or malicious prosecution.^k

The distinction in cases of this kind is, that if there be a personal wrong, or violence done to the wife, so that an action would survive to her she ought to be joined, and not the less because the husband puts into the declaration some special damage accruing to himself; as in *Russell v. Corne*. But where the injury is not of that kind, and no action would sur-

^a 1 Roll. 348. 2 Vent. 195. ^b Cro. Eliz. 461.

^c Baker v. Brereman, Cro. Car. 418. ^d Dunstan v. Burwell, 1 Wils. 224.

^e Bac. Ab. Detin. A. B. N. P. 50. ^f Weller v. Baker, 2 Wils. 414.

^g Horton v. Byles, 1 Sid. 387. Newton v. Hatter, 2 Lord Raym. 1208. Com. Dig. Bar. and Feme, (V.)

^h Com. Dig. Pl. 2 A. 1. 1 Ch. Pl. But see the following cases.

ⁱ Russell v. Corne, Lord Raym. 1031. 1 Salk. 119. 6 Mod. 127. Dix v. Brooks, 1 Stra. 61.

^j Todd v. Redford, 11 Mod. 264.

^k Hyde v. Scissor, Cro. Jac. 538. 3 Bl. Com. 140. Com. Dig. Bar. and Feme, (W.) Smith v. Hixon, 2 Stra. 977.

vive to the wife, the only cause being a special damage to the husband, the wife cannot be joined, having no legal interest in that which forms the gist of the action.^a Therefore, where a declaration by husband and wife stated that the wife lived separate from the husband and kept a boarding house, and that the defendant spoke certain words of her, and concerning her manner of carrying on her business, imputing to her insolvency and adultery whereby she was injured in her business, &c.; the court held that the wife ought not to have been joined, the words being only actionable in respect of damage to the business, and that damage being solely the husband's; and intimated a doubt whether even the husband could maintain an action under the circumstances.^b So in an action by husband and wife, who kept a victualling-house, for saying to the wife, "thou art a bawd to thy own daughter," *per quod J. S.* has left off coming to the house, to the loss of both, &c. After verdict for the plaintiffs, judgment was arrested, because the words were not actionable in themselves, but in respect of the special loss, which was the husband's only.^c But where an action is brought for words in themselves actionable, and no special damage is laid, there such conclusion (*ad dūmnum ipsorum*) is right, for the action survives.^d

Where the injury to the wife is a special damage to the husband, and the cause of action would not survive to the wife, she must not be joined.
*1115

It will be collected, from the preceding cases, that in actions *ex contractu*, the wife *must be* joined in respect of all causes of action which are completed in the wife before coverture; she may be joined, or the husband may sue alone in respect of all causes of actions which accrued during the coverture, and which would survive to the wife; and that in actions *ex delicto*, the wife *must be* joined where the action is founded in any damage or injury done to her property before marriage, or in any personal wrong or injury done to herself, either before or during coverture, as by slander or battery, if the special and consequential damage to the husband be not the gist of the action; and that she may be joined, or the husband may sue alone in actions for *torts* or injuries in respect of her real property during marriage. But the husband must sue *alone* in all cases where the cause of action would not survive to the wife; as in actions for injuries done during the coverture to personal chattels,^e which we have seen are vested by the marriage in the husband. So, in actions on contracts, or for the labor or services of the wife during coverture, where she has no interest, or where she is not the meritorious cause, as where an express promise is not made to her.^f So, in an action on

Result of the authorities.

^a Per Taunton, J., in *Saville v. Sweeney*, 4 B. & Ad. 523. (24 Eng. C. L. 108.)

^b *Id.* In 1 Bac. 733 tit. Baron and Feme, (K.), 6th Ed., where several cases on the subject are collected, it is stated in the margin, that "where an action is brought for words spoken of, or other tort to, the wife, and founded on the special damage of the husband, the wife must not join," cited in 4 B. & Ad. 521. (24 Eng. C. L. 108.)

^c *Coleman et Uxor v. Harcourt*, 1 Lev. 140. B. N. P. 7.

^d *Grove et Uxor v. Hart*, B. N. P. 7. * *Arundel v. Short*, Cro. Eliz. 133.

Buckley v. Collier, Salk. 114. *Bidgood v. Way*, 2 Bl. 1236.

*the case for words not actionable in themselves, spoken of the wife, whereby the husband sustains special damage, he must sue alone.^a

Effect of husband and wife joining in an action.

3.—*Effect of joinder.*] The effect of joining the wife in an action, when the husband might sue alone is, that if the husband die pending the suit, or before judgment is satisfied, the interest in the cause of action will survive to the wife, and not to the husband's representatives; whereas if he sued alone, the interest would pass to his representatives.^b Where a wife is joined, if the husband die pending the suit, it will not abate, and she may proceed to judgment and execution, the death of the husband being suggested on the record.^c But if pending an action by husband and wife, in respect of the *choses in action* of the wife, she die, the action will abate, for the property was never vested in the husband;^d and it is not altered by the bringing of the action, unless judgment is obtained before the death of the wife.^e But if they obtain judgment, he may, notwithstanding her death, issue execution, or maintain an action of debt thereon.^f So if she die pending any action *ex delicto*, to which she is necessarily a party, the suit will abate.^g

*1117 *4.—*Consequences of misjoinder.*] The consequences of a mistake in the proper parties in case of husband and wife are, that if the wife be improperly joined in an action, the defendant may in general demur, move in arrest of judgment, or have a writ of error.^h If the wife improperly sue alone, when she has no legal cause of action, she will be nonsuited;ⁱ but if she sues alone when she might have been joined with her husband, as in trespass for an injury done to her property *dum sola*, the objection should be pleaded in abatement and not in

^a *Coleman v. Harcourt*, 1 Lev. 140. And see *Saville v. Sweeney*, *ante*, 1114. If a wife by ill treatment and fear of bodily injury, is forced to quit her husband's house, a person receiving her is not subject to an action at the suit of the husband, for harboring her. *Berthon v. Cartwright*, 2 Esp. 480. *Philp v. Squire*, Peake, 82. In case for negligence, whereby the plaintiff's wife was killed, he is not entitled to any damages for the loss of her society, or for his mental sufferings on her account after the moment of her death, for in a civil court the death of a human being cannot be complained of as an injury. *Baker v. Bolton*, 1 Camp. 493. But in trespass the plaintiff may give in evidence a consequential injury to his wife, not as a substantial ground of action, but to show how violent the defendant's conduct was. *Huxley v. Berg*, 1 Stark. 98. (2 Eng. C. L. 313.) In an action for an injury arising from the careless driving of the defendant's servant, the plaintiff may recover damages for the injury done to his wife, as well as to himself, without bringing a separate action for each. *Alison v. Foister*, 1 C. & P. 21. (11 Eng. C. L. 304.)

^b Co. Litt. 351, a. n. 1. Cro. Jac. 77. *Per curiam*, in *Bidgood v. Way*, 2 Bl. 1239.

^c 8 & 9 W. III. c. 11. s. 7. Rep. temp. Hard. 397. 1 Ch. Pl. 32.

^d Co. Litt. 351, b. *Checchi v. Powell*, 6 B. & C. 253. (13 Eng. C. L. 163.)

^e *Beaumont v. Long*, Cro. Car. 227. '3 Mod. 189, n.

^f *Freem.* 225. 4 Taunt. 884. 1 Ch. Pl. 75.

^g *Buckley v. Collier*, 1 Salk. 114. *Saville v. Sweeney*, 4 B. & Ad. 514. (24 Eng. C. L. 108.) *Bidgood v. Way*, 2 Bl. 1236.

^h *Candell v. Shaw*, 4 T. R. 361.

bar, though the husband might sustain a writ of error.^a And if she marries pending the suit, her coverture should be pleaded on the first occasion; it cannot be given in evidence on the general issue.^b Where a feme sole replevied her goods which had been distrained, and afterwards married, and the defendant removed the proceedings by *re. fa. lo.*, the original writ being issued in the name of the feme sole; it was held, on the authority of the preceding case, that the defendant might plead her coverture in abatement.^c If the husband sues alone when his wife ought to be joined, in her own right, or in *autre droit*, he will be nonsuited.^d Or if the objection appear on the record, it will be fatal in arrest of judgment, or on error.^e

*SECTION VII.

*1118

ACTIONS AGAINST HUSBAND AND WIFE.

	PAGE		PAGE
1. When husband and wife should be sued jointly in actions <i>ex contractu</i> .		jointly in actions <i>ex delicto</i> .	1119
2. When they should be sued		3. Consequences of misjoinder.	1121

1.—*When husband and wife should be sued jointly in actions ex contractu.*] We have seen in what cases a married woman may be sued alone.^f In actions for debts incurred or contracts made by the wife before marriage, the husband and wife must be joined.⁽¹⁾ It has been held that, if the husband be sued alone, advantage may be taken of it in arrest of judgment, even though he has stated an account, or expressly promised

^a Milner v. Milnes, 3 T. R. 627. Com. Dig. Pleader, 2 A. 1.

^b Morgan v. Painter, 6 T. R. 265. Bac. Ab. Abatement, G.

^c Hollis v. Freer, 2 Hodges, 4. 2 Bing. N. C. 719. (29 Eng. C. L. 467.)

^d Anon. 1 Salk. 282. Bac. Ab. Baron and Feme, K. See Rumsey v. George, 1 M. & S. 176. And so in actions for tort; for though, in general, the non-joinder of plaintiffs in an action for a tort can only be pleaded in abatement, yet, that rule only applies where the party suing had some legal interest, in his own right, in the property affected. A husband has, *independently of his wife*, no legal interest or cause of action whatever, for injuries to her or her property, in those instances in which it is necessary to join as a plaintiff in an action. 1 Ch. Pl. 75.

^e 1 Ch. Pl. 75.

^f *Ante*, 1100.

(1) It is well settled, that a wife cannot be joined with her husband as a defendant in an action founded upon a contract or promise express or implied, except where she has made the contract or promise or done the act from which it is to be implied, before coverture; and in every such case she must be joined. Per Kennedy, J., in *Nutz v. Reutter*, 1 Watts, 233. An action cannot be maintained against a husband alone, without an express assumption for services rendered to, or money expended for, his wife *dum sola*. *Carl v. Wonder*, 5 Watts, 97.)

to pay the debt or perform the contract.* But if the husband has promised to pay the debt in consequence of some new consideration, as forbearance, he may be sued alone on such new promise.^b Where the wife was a yearly tenant, at a rent payable quarterly, and she married before a quarter's rent became payable, it was held, that in an action to recover the quarter's rent the wife should be joined; for there was no occupation by the husband of the first part of the quarter, either in fact or in law.^c A feme covert, executrix or administratrix, must be joined with her husband in an action on any personal contract of the deceased.^d(1) But in cases where an executor may be charged in his own right, as for rent due during the coverture, or a lease which the wife has as executrix or administratrix, the husband may be sued alone.^e The husband is not liable for money lent to the wife, even for the purpose of buying necessities; but if the declaration allege it to be lent at the request of the husband, it will be considered as a loan to the husband; but if at the request of the wife, it will be bad.^f If a declaration against *husband and wife, for a debt contracted by the wife *dum sola*, allege a promise made by the wife after marriage, it will be bad.^g In an action against husband and wife for the debt of the wife *dum sola*, the bankruptcy of the husband during the coverture, may be pleaded in bar.^h So the husband's discharge under the insolvent act is a good plea.ⁱ But it has been held, that if the wife be taken in execution under such circumstances, she will not be entitled to her discharge, unless it appears that she has no separate property, even though her husband has been discharged under the insolvent act.^j But this decision may perhaps be considered as overruled by the preceding case. See the observations of the judges in the former case; Patteson, J., said, that the former was inconsistent with the latter.^k

If the wife die, the husband is not liable to be sued as such

* *Mitchinson v. Hewson*, 7 T. R. 348. *Druce v. Thorne*, Aleyn, 72. *Robinson v. Hardy*, 1 Keb. 281. But see *Harrison v. Hall*, *ante*, 1094.

^b *Id.*

^c *Richardson v. Hall*, 1 B. & B. 50. (5 Eng. C. L. 14.) 3 Moore, 307.

^d 1 Ch. Pl. 58.

^e *Thomp. Ent.* 117, Com. Dig. Bar. and Fem. (Y.)

^f *Stevenson v. Hardy*, 2 Wils. 388. 2 Bl. 872. *Stone v. M'Nair*, 7 Taunt. 432.

(3 Eng. C. L. 166.) *Ross v. Noel*, B. N. P. 136.

^g *Morris v. Norfolk*, 1 Taunt. 212.

^h *Miles v. Williams*, 1 P. Wms. 249. 2 Ves. 181. In the matter of *M'Williams*, 1 Sch. & Lef. 169. 5 B. & Ad. 311. (24 Eng. C. L. 82.)

ⁱ *Lockwood v. Salter*, 5 B. & Ad. 303. (24 Eng. C. L. 82.) The plea must be pleaded by husband and wife together, otherwise there will be a repleader. *Id.* 309.

^j *Sparkes v. Bell*, 8 B. & C. 1. (15 Eng. C. L. 143.) 2 M. & R. 124.

^k 5 B. & Ad. 312. (24 Eng. C. L. 82.)

(1) (In an action of assumpsit against a husband and wife, the latter of whom was administratrix of the goods, &c. of an intestate, to recover a distributive share of the estate, if the wife die pending the suit, it will abate, and the husband is not further liable. *Nutz v. Reuter*, 1 Watts, 229.)

on any contract made by the wife before marriage, unless judgment had been obtained against them both before her death; and if she die after action commenced, and before judgment, the suit will abate. But on the death of the husband, the wife is liable on all contracts made by her before marriage.^a Where the solicitor for the defendant, who was sued jointly with his wife for a debt due from her *dum sola*, pleaded for the husband only; the plaintiff having caused the wife to be served with a copy of the process, was allowed to appear for her according to the statute, and treating the plea put in by the husband alone as a nullity, to sign judgment for want of a plea.^b

2.—*When husband and wife should be sued jointly in actions ex delicto.*] In actions *ex delicto*, the husband and wife must ^{*1120} be sued jointly for *torts* committed by the wife, either before or during coverture; as for assaults, slander, &c.⁽¹⁾ So for assaults, trespasses, and other wrongs which may be committed by two conjointly, they may be sued jointly for the joint act of both.⁴ Husband and wife may be jointly sued in trespass for their joint act.^c Where a declaration in trover against husband and wife stated that the defendants converted the property to their own use; it was held sufficient after verdict; for a conversion does not necessarily import an acquisition of the property, (of which the wife is incapable,) it may be by the actual destruction of the property, which is a tort of which the wife may be guilty as well as the husband.^f But they cannot be jointly sued for slander spoken by both, for it would be error to sue the wife for words spoken by the husband *only*. The proper mode of proceeding against them under such circumstances is, to sue the husband and wife jointly for the words spoken by the wife, and the husband alone for the words spoken by him; and the two actions cannot be consolidated.⁵ A husband is liable to be sued jointly with his wife for her libel or slander, though she has committed adultery and they live separate, at least if it be not shown that the wife at the time was living in adultery.^b A husband is liable to be sued alone for a breach of the revenue laws by his wife, if she acted under his authority, which is a question for the consideration of the

When husband and wife may be sued jointly for *torts*.

^a *Mitchinson v. Hewson*, 7 T. R. 350. Com. Dig. Bar. & Fem. 2, b. *Woodman v. Chapman*, 1 Camp. 189. But the wife's administrator will be liable for contracts made by her before marriage. 3 P. Wms. 409.

^b *Russell v. Buchannan*, 6 Price, 139.

^c Com. Dig. Bar. and Fem. (V.) Bac. Ab. Bar. and Fem. (L.)

^d 1 Vent. 93.

^e *Vine v. Saunders*, 4 Bing. N. C. 96.

^f *Keyworth v. Hill*, 3 B. & A. 685. (5 Eng. C. L. 423.) *Draper v. Fulke*, Yelv. 165. But in strictness, trover for a conversion during the marriage should be against the husband alone. 1 Ch. Pl. 93.

^g *Swithin v. Vincent*, 2 Wils. 227.

^h *Head v. Briscoe*, 5 C. & P. 484. (24 Eng. C. L. 419.)

(1) (A marriage *de jure* is essential to render a man responsible for torts committed by his wife before coverture. *Overholt v. Ellswell*, 1 Ashmead, 200.)

jury.^a "If goods be delivered to husband and wife, *detinue* will lie against the husband only, and not against both."^b If an action be brought against a *feme sole*, who before judgment marries, execution may be taken out against her alone.^c So if a woman marries after interlocutory judgment, in *assumpsit*, *the plaintiff may enter up final judgment without joining the husband, and sue out execution against the *feme only*.^d

In an action of trespass against husband and wife for *her tort*, before or during coverture, if she die before judgment the suit will abate; but if her husband die or become bankrupt, her liability will continue.^e

3.—*Consequences of misjoinder.*] If the wife be sued alone, on her contract or *tort*, before marriage, she must plead her coverture in abatement; it cannot be pleaded in bar, or given in evidence at the trial as a ground of nonsuit; or a writ of error *coram nobis* may be brought.^f But if she be sued on her supposed contract, made during coverture, she must plead it specially in bar, she cannot give it in evidence under the general issue.^g If the husband and wife be improperly sued jointly, on a contract after marriage, the action will fail as to both.^h If the husband be sued alone upon the contract of his wife before marriage, and the objection appears on the face of the declaration, he may demur, move in arrest of judgment, or bring error.ⁱ So if the husband and wife be sued jointly for torts during coverture, of which they could not be jointly guilty, as for slander; if the objection appear on the record it may be taken advantage of by demurrer, in arrest of judgment, or by error.^j

^a *Attorney-General v. Riddell*, 2 Tyr. 523. 2 C. & J. 493. A wife may be guilty of a forcible entry into the house of her husband, and other persons also, if they assist her in the force, although her entry is in itself lawful. *Rex v. Smith*, 1 M. & Rob. 155.

^b *Per Dodderidge, J.*, Leon. 312.

^c *Doyley v. White*, Cro. Jac. 323.

^d *Cooper v. Hunchin*, 4 East, 521.

^e 1 Ch. Pl. 93. *Rep. temp. Hard.* 399.

^f *Per Lord Kenyon*, in *Milner v. Milnes*, 3 T. R. 631. *Com. Dig. Pleader*, (2 A. 1.) 1 Ch. Pl. 93.

^g *Reg. Gen. H. T.* 4 W. IV, 3.

^h *Palm*. 312. See *Stone v. Macnair*, 7 Taunt. 432. (2 Eng. C. L. 166.) 4 Price, 48. *Morris v. Norfolk*, 1 Taunt. 212.

ⁱ *Mitchinson v. Hewson*, 7 T. R. 348. *May v. House*, 2 Chitty, 697. (18 Eng. C. L. 461.)

^j *Swithin v. Wilson*, 2 Wils. 227. *Dyer*, 19, a.

SECTION VIII.

DEEDS OF SEPARATION.

THE law in respect of the validity of deeds made in contemplation of a future separation, does not appear to be clearly settled. In *Rodney v. Chambers*,^a the court decided that the husband's covenant with the wife's trustees to pay her an annuity as a separate maintenance, in the event of a separation *in future* taking place between them, with the *approbation of the trustees*, was a legal and valid covenant; and that the trustees were entitled to recover, in an action against the husband, the arrears which had accrued on the annuity after separation. In *Chambers v. Caulfield*,^b the preceding case was thoroughly canvassed, and its authority never doubted. With reference to it, Lawrence, J., thus expressed himself. "In that case there was an averment that the separation was with the consent of *trustees*; we thought there was nothing illegal in the parties agreeing to refer the question what was a good cause of separation to a domestic forum. The court, therefore, only decided in that case, that a covenant for separation and a separate maintenance was good, not that a covenant was good *generally*, that a wife might separate herself from her husband whenever she pleased, for that would be to make the husband tenant at will to the wife of his marital rights." See also Lord Vane's case.^c But the decision of *Rodney v. Chambers* is considered as virtually overruled by the case of *Durant v. Titley*,^d which came before the court on a writ of error; there the judges said that the courts had already gone too far, consistently with policy and morality, in supporting deeds of separation; they decided that a deed providing for a *future* separation was void. The case of *Durant v. Titley*, however, differed from the preceding cases, for the effect of the deed in that case, was to provide a separate maintenance for the wife, whenever she should be living apart from her husband, *leaving it to her to separate from him at pleasure*; whereas in *Rodney v. Chambers*, the deed provided for the wife only in the event of a future separation, with the approbation of the trustees. In *Jee v. Thurlow*,^e Abbott, C. J., said, that in deciding *Durant v. Titley*, it was not intended to shake any former decision; and Mr. Justice Bayley observed, that in *Rodney v. Chambers* the intervention of impartial persons was required to decide, whether sufficient cause of separation did or did not exist. So that it is clear that the court in *Jee v. Thurlow* did not consider *Rodney v. Chambers* as overruled

^a 2 East, 283.^b 6 East, 244.^c 2 Stra. 1202. 13 East, 171, *in notis*.^d 7 Price, 577.^e 2 B. & C. 551. (9 Eng. C. L. 174.)

by *Durant v. Titley*. The principle laid down by *Durant v. Titley* was recognised and acted upon in *Hindley v. the Marquis of Westmeath*,^a in which "the deed of separation was in terms similar to that before the court in *Durant v. Titley*."^b

With reference to *Durant v. Titley*, it is said,^c that it may now be considered that a deed or settlement providing a separate maintenance for a wife or an intended wife, in the event of future separation, either with or without the consent of trustees or other persons, is a provision which will not be enforced either at law or in equity. Yet see what the court said in *Jee v. Thurlow*, *supra*.

Subse-
quent co-
habitation
avoids a
deed of se-
paration.

A deed of separation is rendered void by subsequent cohabitation,^d unless it contains an express provision to the contrary. As where a husband gave a bond to trustees conditioned for the payment of an annuity to his wife, &c. unless she should molest him; and entered into a deed of separation, containing a provision for the maintenance of the wife, in which it was provided, "*that if he and his wife should thereafter agree to live together again, such cohabitation should in no way alter the trusts created by the indenture.*" The defendant and his wife separated, and afterwards lived together again for a time, and this fact was pleaded to an action by the trustees upon the annuity bond as avoiding that security; held, on demurrer to the plea, that the reconciliation was no bar to an action on the bond; for there was nothing in the deed to show that the parties intended that the trust should be avoided, in case of their again cohabiting. But on the contrary it was expressly provided that the trusts should be continued, though a reconciliation should take place. Though the deed contained

*1124

some covenants which a court of equity would not enforce, that did not destroy the effect of the whole.^e

A private understanding or agreement between husband and wife to live separate, is not recognised by law.^f A deed of separation between husband and wife, was held not to bind the wife surviving, nor to deprive her of her share in her husband's personal estate to which she was entitled by the custom of the city of London.^g

^a 6 B. & C. 200. (13 Eng. C. L. 141.)

^b Per Abbott, C. J., 6 B. & C. 211. *Westmeath v. Westmeath*, 1 Jacob, 140. 1 Dow. & Clarke, 510. *Westmeath v. Salisbury*, 5 Bligh. N. S. 339.

^c 2 Roper, 281.

^d *Bateman v. Ross*, 1 Dow. 235. *Durant v. Titley*, *supra*. *Scholey v. Goodman*, 8 Moore, 350. *Fletcher v. Fletcher*, 2 Cox, 105.

^e *Wilson v. Mushett*, 3 B. & Ad. 743. (23 Eng. C. L. 175.)

^f Per Sir John Nicholl, in *Smyth v. Smyth*, 1 Hagg. 514.

^g *Slater v. Slater*, 1 Younge & Coll. 28.

*CHAPTER XVI.

INSURANCE.

	PAGE
I. Of the contract of insurance, and the parties thereto.	
II. What may be insured.	1129
III. Of the interest of the insured.—Wager policies.	1133
IV. Re-insurance.—Double insurance.	1138
V. Of the form and requisites of a policy of insurance.	1139
VI. Valued and open policies.	1152
VII. Construction of policies.	1153
VIII. Of losses by the perils insured against.	1155
IX. Of a total loss and abandonment.	1165
X. Stranding.	1173
XI. General average.	1176
XII. Partial loss.—Particular average.	1178
XIII. Adjustment.	1180
XIV. Warranties.	1181
XV. Seaworthiness.	1189
XVI. Deviation.	1193
XVII. Illegal voyage.	1199
XVIII. Misrepresentation and concealment.	1203
XIX. Return of premium.	1209
XX. Bottomry and respondentia.	1214
XXI. Action on the policy.	1217
XXII. The declaration and pleadings.	1217
XXIII. Consolidation rule.	1221
XXIV. Evidence.	1223
XXV. Insurance upon lives.	1236
XXVI. Insurance against fire.	1233

SECTION I.

OF THE CONTRACT OF INSURANCE, AND THE PARTIES THERETO.

	PAGE		PAGE
1. Of the contract of insurance.		2. Who may be insured.	1126
		3. Who may insure.	1128

1—*Of the contract of insurance.*] INSURANCE is a contract, whereby one party, in consideration of a stipulated sum of money undertakes to indemnify the other against certain perils *or risks to which he is exposed; or to pay him a certain sum upon the happening of some uncertain event. The party who takes upon himself the risk is called the *insurer*, and sometimes the *underwriter*, from his subscribing his name at the foot of the policy; the party protected by the insurance, the *insured* or *assured*; the sum paid to the insurer as a consideration for his undertaking, is called the *premium*; and the instrument, in which the terms of the contract are set forth

is called a *policy of insurance*.^a Though there are various events which may become subjects of insurance, the following pages will be confined to the consideration of marine insurances, insurance upon lives, and insurance against fire; as these species of insurance are the most usual subjects of litigation, and of the greatest public utility. And first of marine insurance, which is made for the protection of persons having an interest in ships or goods on board, from the loss or damage which may happen to them from the perils of the sea, during a certain voyage or fixed period of time.^b

2.—*Who may be insured.*] In this country all persons, whether British subjects or aliens, may in general be insured; the only exception to this rule is, the case of an *alien enemy*. For reasons of public policy, the property of an alien enemy cannot be legally insured; or if insured, the policy cannot be enforced in any court of law or equity.^c Even though the policy be effected in the name of a British subject, as a trustee for the person interested;^d or though the property insured be British manufacture exported from this country;^e or though the insurance be effected, and the risk commenced before the war breaks out;^f in no case can a policy of insurance extend to cover a loss happening during the existence of hostilities *between the respective countries of the insured and the insurer; because during the existence of such hostilities, the subjects of the one country cannot be permitted to lend their assistance to protect by insurance, the property and commerce of the subjects of another.^g But where the insurance, the loss, and the cause of action had arisen before the insured had become alien enemies, it was held, that a British agent in whose name the policy was effected, might recover on the policy, even during the war, where the defendant pleaded the general issue only, which is a plea of perpetual bar; for the contract was only suspended during the continuance of hostilities, and was capable of being enforced at the return of peace, if the debt was not in the mean time seized by the crown.^h

Who is considered an alien enemy.

Any person whether a British subject or a neutral, who resides in an enemy's country, and carries on trade there, is for all civil purposes to be regarded as an alien enemy; he is therefore incapacitated from suing in an English court of justice, and

^a Marshall on Insurance, 1.

^b *Id.* 2.

^c Brandon v. Nesbitt, 6 T. R. 23. Furtado v. Rogers, 3 B. & P. 191. Touteng v. Hubbard, *id.* 291. Casseres v. Bell, 8 T. R. 166. Willison v. Patteson, 7 Taunton, 439. (2 Eng. C. L. 167.) Albretch v. Susman, 2 Ves. & B. 323. *Ex parte Boussemaker*, 13 Ves. 71.

^d Bristow v. Towers, 6 T. R. 35. Kensington v. Englis, 8 East, 289. Brandon v. Nesbitt, *supra*.

^e *Id.* Flindt v. Waters, 15 East, 260.

^f Brandon v. Curling, 4 East, 410. Touteng v. Hubbard, 3 Bos. & P. 299.

^g Per Lord Ellenborough, C. J., 4 East, 417.

^h Flindt v. Waters, 15 East, 260. Harman v. Kingston, 3 Camp. 153.

consequently he cannot be insured.^a The mere residence, however, of a British subject in an enemy's country, is not sufficient to subject him to the disabilities of an alien enemy, inasmuch as he may be detained there against his will; there must be some evidence of the purpose of his residence, or of his adhering to the enemy, as that he traded there.^b But where a neutral, and an alien enemy, insured their respective interests in three vessels, by separate agents, and in separate policies; it was held, that the neutral was entitled to recover on the policy for a loss arising from one of the perils insured against.^c

The disabilities ordinarily attaching upon alien enemies, or upon British subjects trading with them, may be removed by a license from the crown; and a license of this nature, legalising a particular adventure, incidentally legalises all the measures necessary to be adopted for its due execution. Therefore where a ship belonging to an alien enemy is protected by the king's license, an insurance may be effected on such ship by a British subject, as trustee on behalf of the ship-owner, and an action on the policy may be maintained at the suit of the trustee, even in time of war, because the public policy of the country is not contravened by sustaining and giving effect to such trust; and although the king's license cannot, in point of law, have the effect of removing the personal disability of the ship-owner (being an alien enemy) in respect of the suit, so as to enable him to sue in his own name, yet it purges the trust in respect to him of all the injurious qualities in regard to the public interest.^d So, a license granted upon the representation of *W. V.* on behalf of different British merchants, for permitting a ship (by name) to proceed under any colors, except the French, with a cargo of such goods as were permitted by an order in council to be exported from London to any ports within certain limits, the whole of the country within those limits being in hostility with this country, was held to protect the property of an alien enemy residing in the hostile country, shipped on his account in this country, and therefore an insurance for his benefit was held legal.^e

*1128

3.—*Who may insure.*] At common law any person might insure on his own separate account, or any number of men might associate and form a company for that purpose. But by 6 Geo. I, c. 18, s. 12, a charter was granted by the crown to

^a *M'Connell v. Hector*, 3 B. & P. 113. *Roberts v. Hardy*, 3 M. & S. 536. 6 M. 98. *Albretch v. Susman*, 2 Ves. & B. 323. *O'Mealey v. Wilson*, 1 Camp. 482.

^b *Harman v. Kingston*, 3 Camp. 153. *Roberts v. Hardy*, 3 M. & S. 533. *Willison v. Patteson*, 7 Taunt. 439. (2 Eng. C. L. 167.) *The Ocean*, 5 Rob. Adm. Rep. 90.

^c *Rotch v. Edie*, 6 T. R. 413.

^d *Kensington v. Inglis*, 8 East, 273. *Flindt v. Scott*, 5 Taunt. 700. (1 Eng. C. L. 231.) *Morgan v. Oswald*, 3 Taunt. 368. *Fayle v. Bourdillon*, 3 Taunt. 546.

^e *Hullman v. Whitmore*, and *Same v. Scott*, 5 M. & S. 337. *Rucher v. Ansley*, 5 M. & S. 25. *Anthony v. Moline*, 5 Taunt. 711. (1 Eng. C. L. 243.) *Robinson v. Touray*, 1 M. & S. 217.

the Royal Exchange Assurance Company, and the London Assurance Company, whereby they were incorporated and invested with the privilege of effecting marine insurances, to the exclusion of all other partnerships or societies. By that statute any insurance effected on the joint responsibility of two or more persons was illegal and could not be enforced; but any private person might underwrite on his own individual account.^a

- *1129 *The exclusive privilege granted to these companies, was however abolished, by the 5 Geo. IV, c. 114. So that at present any company or partnership may insure or underwrite; the latter statute, however, provides that the rights and privileges of the two corporations referred to, shall not be affected otherwise than by making it lawful for other corporations and bodies politic, and persons acting in society and partnership, to grant and make policies of insurance and contracts of bottomry.

SECTION II.

WHAT MAY BE INSURED.

MARINE insurances are generally made upon ships, goods, freight, merchandise, and bottomry loans.

Insurance of freight. Freight is the profit earned by the ship-owner in the carriage of goods on board his ship. An insurance upon freight has no reference to the hull of the ship, or to its outfit for the voyage, both of which are protected by an insurance of the ship; the object of insuring freight is to secure the ship-owner from the loss of what he would earn in the carriage of the goods, in case he is prevented by the perils of the sea from actually earning anything.^b(1) In order to recover upon a freight policy, the insured must show that an inchoate right to the freight has commenced, by goods having been put on board from the carriage of which freight would arise;^c or that there was some contract whereby he would be entitled to freight if the voyage were not stopped by the perils insured against; as where a ship was chartered from *D.* to *C.*, and back to *D.*, at a certain rate

^a 6 Geo. I, c. 17. *Mitchell v. Cockburn*, 2 H. Bl. 379. *Booth v. Hodgson*, 6 T. R. 406. *Branton v. Taddy*, 1 Taunt. 7. *Evereth v. Blackburn*, 2 Stark. 66. (3 Eng. C. L. 247.) *Ex parte Bell*, 1 M. & S. 751. *Aubert v. Maze*, 2 B. & P. 371. This statute did not extend to prevent partners to lend money on *respondentia*. *Gore v. Wynne*, N. & M. 393.

^b *Forbes v. Aspinall*, 13 East, 323.

^c *Tonge v. Watts*, 2 Stra. 1251.

(1) (It is well settled, that the charterer of a vessel cannot insure the amount of his charter money under the general name of freight. *Mollen v. The National Ins. Co.*, 1 Hall, 452. *Robbins v. New York Ins. Co.*, *Ibid.*, 325.)

of freight upon the outward cargo; and after delivering her outward cargo at *L.*, the charterers were to provide her a full cargo homewards at the current freight, from *L.* to *D.*, &c.; *held, that an insurance by the owner of the ship on the freight, at and from *L.* to *D.*, attached whilst the ship lay at *L.* delivering her outward cargo, and before any part of the homeward cargo was shipped, during which time she was captured by an enemy; the contract of affreightment by the charter-party being entire, and the risk on the policy having commenced.^a So, if a right to freight has commenced, as if part of the goods are on board, and the rest are ready to be shipped, the plaintiff will be entitled to recover on an insurance on freight.^b But where a valuation was made with reference to the freight on an entire cargo, and there is no contract by any person to load a complete cargo, or to pay dead freight, and part of the cargo is put on board, but before the cargo is completed the ship is lost by one of the perils insured against, the insured under these circumstances can only recover in respect of the loss of the freight on the goods which have been put on board.⁽¹⁾ *1130

Freight may be insured for part of an entire voyage; and if the ship be on the voyage insured when the loss happen, the assured will be entitled to recover although the ultimate destination of the ship was not disclosed to the underwriter.^d Where a vessel, having sailed from her port of lading with a cargo of goods, was obliged to put back in consequence of a peril of the sea, and it being discovered that part of the cargo which was taken out, was damaged by sea water, and could not be reshipped without a delay of six weeks, the captain, in the exercise of a sound discretion, sold the damaged goods, sailed with the remainder, and arrived in safety; held, in an action on a policy on freight for the voyage, that the underwriters were not liable *pro tanto* for the loss of the freight of the goods sold; for though the master acted prudently in leaving the goods behind, yet if it should be held in a case of

^a *Horncastle v. Stuart*, 7 East, 400. *Thompson v. Taylor*, 6 T. R. 478. *Davison Wellasey*, 1 M. & S. 313. *Flint v. Flemyng*, 1 B. & Ad. 45, (20 Eng. C. L. 340,) *post*, 1146.

^b *Montgomery v. Eggington*, 3 T. R. 362.

^c *Forbes v. Aspinall*, 13 East, 323. *Forbes v. Cowie*, 1 Camp. 520. *Patrick v. Eames*, 3 Camp. 441.

^d *Taylor v. Wilson*, 15 East, 324.

(1) (There seems to be no doubt that a recovery may be had on a policy on freight, if the vessel is loaded, though she has not sailed; or if she has an express contract for a load, though none of it is on board; or if she has set sail for the place at which she is to load, or if being at the place of loading, her owners have commenced fitting her, to receive and carry the loading contracted to be carried. Per *Huston, J.*, in *Adams v. The Penna. Ins. Co.*, 1 Rawle, 106. But the disappointment of a reasonable hope of obtaining a cargo for the owner of the vessel himself, at the port to which she is sailing, with specie on board to purchase a cargo, but where no cargo has been purchased, nor a positive contract made for the purchase of one, does not authorise a recovery on a valued policy on freight, where the ship is lost on the voyage to the port of destination. *Ibid.*)

- *1131 this kind, that the underwriter would be liable to make good the freight, it *would open a temptation to the master of a ship to sail away, under circumstances like these, instead of stopping until the goods could be reshipped, which would be very mischievous.^a

Expected profits may be insured.

The expected profits on a cargo may be insured. An insurance effected on the profits of a cargo of molasses, on behalf of a merchant who had a contract with government to supply the army in Canada with spruce beer, was held to be valid.^b So an insurance effected on imaginary profits, on a cargo of indigo, at and from Bordeaux to Hamburg, which was stated in the declaration to mean the profit which the said cargo would produce upon the sale thereof at Hamburg, if it should arrive in safety, was held to be valid.^c So the profits of a ship employed in trade on the coast of Africa may be insured.^d

But to enable the insured to recover, he must show that he has sustained a loss by one of the perils insured against. Upon an insurance on profits valued at 400*l.*, where the plaintiff declared as for a total loss, and it appeared that after a shipwreck, by which many of the slaves, on the profits of whom the insurance was made, were lost, but the remainder reached the market, and were there sold; and it did not appear what profit was made of them, or whether if all had arrived any profit would have been made; though it was found that the produce of those who were sold did not give a profit upon the whole adventure; held, that the plaintiff was not entitled to recover.^e An insurance may be effected on profits generally, without more description, and engrafted upon a policy on ship and goods, in the common printed form, for a certain voyage; with a return of premium for short interest, the assured proving an interest in the cargo.^f

Seamens' wages cannot be insured.

*1132

There are some things which in their nature are insurable, but which on the grounds of public policy cannot become a subject of insurance, such as the wages of seamen, which, as *by various acts of parliament they are made to depend on the safe arrival of the ship, and are liable to forfeiture in case of desertion or misconduct, are prohibited from being insurable, lest mariners, by being indemnified and having their wages secured, might evade the operation of the salutary provisions of the legislature and neglect their duties.^g Even a perquisite to which a seamen is entitled at the end of the voyage, in lieu of wages, is subject to the same rule as his ordinary wages and cannot be insured.^h But a mariner may insure goods which

^a *Mordy v. Jones*, 6 D. & R. 479. 4 B. & C. 394. (10 Eng. C. L. 366.)

^b *Grant v. Parkinson*, 3 B. & P. 85, n. 6 T. R. 483.

^c *Henrickson v. Margetson*, 2 East, 550.

^d *Barclay v. Cousins*, 2 East, 544.

^e *Hodgson v. Glover*, 6 East, 316.

^f *Eyre v. Glover*, 16 East, 218. 3 Camp. 276.

^g Per Lord Mansfield, C. J., in *Carter v. Boehm*, 3 Burr. 1912. 1 Bl. 594. 2 N. R. 294.

^h *Webster v. De Tassat*, 7 T. R. 157. 2 B. & P. 119.

he has purchased with wages that he has received.^a The rule prohibiting a mariner from insuring his wages, does not apply to a captain, for he may insure his commission privileges, goods on board, &c.^b And so may a governor insure a fort against the capture of an enemy.^c But a policy effected on money lent to the captain of a ship, payable out of the freight, has been held to be illegal on the face of it.^d So was a policy on money advanced to a captain of a vessel "lost or not lost."^e

It may be laid down as a general rule, that no insurance can be legally effected on any species of goods or merchandise intended to be imported or exported in contravention of the laws of the realm; any insurance, therefore, effected on commerce prohibited by the law of this country, is void and cannot be enforced,^f and the insurer may take advantage of this objection, though he knew the trade to be illegal.^g But though insurances in contravention of our own laws are invalid, an insurance may be legally effected on a trade prohibited by the laws of a foreign state, for the law of England pays no regard to the revenue laws of another country; and if the insurer is cognisant of the nature of the trade intended to be insured, the contract will be binding on him.^h

Smuggled goods cannot be insured.

*1133

SECTION III.

OF THE INTEREST OF THE INSURED.—WAGER POLICIES.

FORMERLY insurances might be effected without the insured having any interest in the subject matter.⁽¹⁾ An insurance of this kind was denominated a wagering policy, and was usually conceived in these terms, "interest or no interest," or, "without further proof of interest than the policy;" in order to preclude all inquiry into the interest of the insured. Originally, these policies were discountenanced by the courts of justice;ⁱ their legality, however, was after some time established.^j But

Wagering policy, what.

^a 1 Mars. In. 91.

^b King v. Glover, 2 N. R. 206.

^c Carter v. Boehm, 3 Burr. 1912.

^d Wilson v. Royal Exchange Company, 2 Camp. 626.

^e Siffkin v. Allnutt, 1 M. & S. 39.

^f Marshall on Insurance, 55. 6 G. IV, c. 108, s. 47. 4 & 5 W. & M. c. 15, s. 14. Chalmers v. Bell, 3 Bos. & P. 604.

^g Per Lord Mansfield. C. J., in Holman v. Johnson, Cowp. 343. Marshall, 56.

^h Lever v. Fletcher, Park. 360. Holman v. Johnson, *supra*. Johnson v. Machielsne, 3 Camp. 44.

ⁱ Goddard v. Garrett, 2 Ves. 269.

^j Dean v. Dicker, 2 Stra. 1250. Goss v. Withers, 2 Burr. 695. See Craufurd v. Hunter, 8 T. R. 23. Lucena v. Craufurd, 2 N. R. 269.

[(1) (*Adams v. The Penna. Ins. Co.* 1 Rawle, 97.)

The insured must have an interest.

*1134

Foreign ships are not within the statute.

What is a sufficient interest.

the evils resulting from this mischievous species of gaming were found so injurious to the best interests of the country, that the legislature found it necessary to interfere, and by stat. 19 Geo. II, c. 37, s. 1, after reciting "that it hath been found by experience that the making of insurances, interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices," &c., it was enacted, "that no assurances should be made by any persons, bodies corporate or politic, on any ship *belonging to his majesty, or any of his subjects*, on any goods laden, or to be laden, on board such ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer, and that such assurances should be void." But by s. 2, "insurances on private ships of war, fitted out by any of his majesty's subjects, solely to cruise against his enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the insurer." And by s. 3, "any effects from any port or places in Europe or America, in possession of the crowns of Spain or Portugal, may ^abe insured in the same manner as if this act had not been made."^a

In consequence of the words "on any ships belonging to his majesty, or any of his subjects," in the first section, it has been held, that this statute does not extend to foreign ships, and that an insurance "interest or no interest" may be effected on them. Foreign ships were excluded on account of the difficulty that might be experienced in procuring the attendance of foreign witnesses to prove the interest.^b If, however, the insurance be in the common form, and the words "interest or no interest," or "without further proof of interest than the policy," or the like, be not inserted, the policy will not be considered a wagering policy, and the insured will not be entitled to recover on it without showing an interest in the subject matter, even though it be foreign property, for by the custom of merchants the policy is void.^c

With respect to the interest which the insured must have in order to give validity to the contract, it may be observed that it is not necessary he should have a property in the subject matter; "interest does not necessarily imply a right to the whole or part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to or concern in the subject of insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or dangers as to have a moral certainty of advantage or benefit but for those

^a 19 G. II. c. 37.

^c Cousins v. Nantes, 3 Taunt. 513.

^b Thellusson v. Fletcher, Doug. 301.

risks or dangers, he may be said to be interested in the safety of the thing, and such interest may be a subject of insurance."^a

The interest need not be indefeasible, it may be either legal or equitable. If a merchant abroad mortgage to his correspondent in England his interest in certain goods and freight; the correspondent, after the mortgage becomes absolute, may *insure the *legal* interest on his own account, or the *equitable* *1135 interest on account of the mortgagor.^b A reasonable expectation of profit, or of future interest in the thing insured, is an insurable interest.^c

Where a ship was taken as prize by the conjoint forces of the army and navy, the captors, before condemnation, had an insurable interest under stat. 45 Geo. III, c. 72, s. 3, whereby the crown gives up its right in the prize to the captors, although such interest was defeasible, as well by the release of the crown as the adjudication of the court of admiralty to restore the prize to the former owners.^d So, trustees having the disposal of ships and goods, subject to the direction of others, may insure in their own names. It has been held that commissioners appointed by the king under the statute 35 Geo. III, c. 80, which enabled them "to take into their possession and care all Dutch ships and effects detained or brought into the ports of Great Britain, and to manage, sell, and dispose of the same to the best advantage, according to the instructions they should receive from his majesty and his privy council," might insure in their own names such ships and effects, after seizure abroad, and while they were *in transitu* to this country.^e

Where goods are consigned by a vendor to a purchaser, or by a debtor to a creditor, the consignee has an insurable interest in them, though they may be stopped *in transitu* and his title to them be defeated.^f So, the commissions or profits to accrue to a consignee on the arrival of a cargo constitute a good insurable interest.^g The indorsement of a bill of lading to a creditor, *prima facie*, conveys the whole property in the goods from *the time of its delivery, but if the intention of the parties appears to have been only to bind the net proceeds in case of the arrival of the goods, then an insurance made on account of the indorser, after such indorsement, is good.^h

Trustees
for prize
vessels.

A consignee has
an insurable
interest.

^a Per Lawrence, J., in *Lucena v. Craufurd*, 2 N. R. 302, 3; where this subject is fully considered.

^b Per Ashhurst, J., in *Smith v. Lascelles*, 2 T. R. 188.

^c Grant v. Parkinson, Park. 402. Marshall, 107. See *ante*, 1131.

^d *Stirling v. Vaughan*, *supra*. Le Cras v. Hughes, Park. 406. See *Robertson v. Hamilton*, 14 East, 692. *Boehm v. Bell*, 8 T. R. 154.

^e *Craufurd v. Hunter*, 8 T. R. 13. *Lucena v. Craufurd*, 3 B. & P. 75. 2 N. R. 269. See *Routh v. Thompson*, 13 East, 271.

^f Per Lord Ellenborough, C. J., in *Stirling v. Vaughan*, 11 East, 628. *Hill v. Secretan*, 1 B. & P. 315. *Wolf v. Horncastle*, 1 B. & P. 316. *Fraiano v. Long*, 4 B. & C. 219. (10 Eng. C. L. 313.) But a consignee has no interest in the cargo after a stoppage *in transitu*. *Clay v. Harrison*, 10 B. & C. 99. (21 Eng. C. L. 31.)

^g *Flint v. Le Mesurier*, Park. 403.

^h *Hibbert v. Carter*, 1 T. R. 745. See *Sellick v. Smith*, 3 Bing. 603. (13 Eng. C. L. 66.) *Sargent v. Morris*, 3 B. & A. 277. (5 Eng. C. L. 283.)

The master of a ship drew a bill on his owner for supplies for the ship, and wrote on the bill, "if this be not honored, the holder will insure the amount, and place the premium to the drawer's account." The bill being dishonored, the holder insured the ship for three months, and declared interest in the bill, which was to be sufficient proof of interest; the ship was lost after the three months: held, that the holder of the bill was authorised to insure for his own benefit, and was warranted in insuring for three months, and that he might recover the premium against the drawer.^a

Where *B.* sold to plaintiff, to be delivered at Portsmouth, 500 barrels of oats, to be shipped by *I.* from Youghall; four days afterwards, *B.* advised plaintiff that *I.* had engaged room in the packet to take about 600 barrels of oats on plaintiff's account; on the following day, plaintiff insured 400*l.* on oats per the packet; the oats were shipped, but the packet being bound for Southampton, and refusing to touch at Portsmouth, *B.* sold the oats again, and delivered the bill of lading to *O.* at Southampton; plaintiff insisting that he was entitled to the oats, and would assert his right by action; in the mean time the packet was lost, and after a long dispute, plaintiff, in consideration of 60*l.*, by indorsement on the policy, vested the interest in the insurance in *B.*, held, that the plaintiff had an insurable interest in the oats at the time that the policy was effected, and that he was entitled to recover the amount from the underwriter, for the oats were appropriated to him, and he did no act whereby his interest in them had been divested until after the loss had happened.^b

Ship-own-
ers and
freighters.
*1137
Register.

In the insurance of ships or freight, it is sometimes important to attend to the register, as where a party claims through a *transfer under which he has not had actual possession; for then a bill of sale is a medium of proof essential to his title, and that will be of no effect unless the requisites of the registry acts have been complied with.^c A register is frequently essential to the communication of a title, and the want of it is, in many instances, conclusive to disprove a title. Proof of the registry of a ship in the name of one or more persons is no evidence for them to prove an interest in them, for it amounts to nothing

^a *Tasker v. Scott*, 1 Marsh. 556. 6 Taunt. 234. (1 Eng. C. L. 369.)

^b *Sparkes v. Marshall*, 3 Scott, 172. 2 Bing. N. C. 761. (29 Eng. C. L. 480.) 2 Hodges, 44.

^c By the 4 Geo. IV, c. 41, all the former registry acts were repealed. By 6 Geo. IV, c. 104, all the statutes relating to the customs, to the extent of 445 acts, were repealed, and the whole matter including the registry of ships, comprised in 11 acts, from c. 106 to 116 inclusive. By this act, however, it was considered that the new registry act, 4 Geo. IV, c. 41, was repealed, and a new act, 6 Geo. IV, c. 110, was passed, which with a few alterations, introduced by 7 Geo. IV, c. 48, s. 25, 26, 27, contains the present law, respecting the registry of ships. Abbott on Ship, 5th Ed. 26. 2 Stark. Ev. 634. The 6 Geo. IV, c. 110, respecting the registering of ships, has been repealed by 3 & 4 W. IV, c. 50; and the registering of British vessels is now regulated by the 3 & 4 W. IV, c. 55.

more than their declarations. Where a vessel, in respect of the ownership of which freight was claimed, was registered in the names of two only, the allegation of interest in four, was held, not to be sustained by evidence that the four had jointly advanced the money with which the ship was purchased; the four partners had not insurable interest in the freight, for they had neither a legal nor an equitable interest in the ship, as it was not registered in their names.^a

Where it is stipulated by a charter-party, that in case the ship is lost during the voyage, the charterer shall pay the owner a sum of money, which is estimated as the value of the ship, the owner has still an insurable interest in the ship during the voyage.^b A ship-owner who has entered into contracts for freight, has an insurable interest in the freight, although such contracts are not in writing.^c

But an agreement to pay 20% to the defendant at the next port a ship should reach, provided that if she did not save her passage to China, the defendant would pay to the plaintiff 1,000% at the end of one month after she arrived in the river Thames, *without reference to any property, though one of the parties had some goods on board liable to suffer by the loss of the season, is a wagering policy within the above statute.^d *1138

A part payment of freight in advance seems to constitute an insurable interest, since the loss of the ship and goods must produce a loss to the freighter of the sum advanced; but a loan of money to the master or captain for the ship's use does not constitute an interest. A loan of money for the ship's use is not insurable.

Where a memorandum for charter stated that one half of the freight was to be paid in cash on unloading and right delivery of the cargo, and the remainder by bill on London, at four months' date, "the captain to be supplied with cash for the ship's use;" in pursuance of this last stipulation, the master drew a bill of exchange on the freighters, which was duly accepted and paid; held, that the freighters had no insurable interest in such bill, for it was to be considered as a loan to the owner of the ship, and not as a payment of freight in advance.^e

^a *Camden v. Anderson*, 5 T. R. 709. 2 Stark. Ev. 636. See *Marsh v. Robinson*, 4 Esp. 98. *Ex parte Yallop*, 15 Ves. 66. *Trehwela v. Rowe*, 11 East, 435. *Sutton v. Buck*, 2 Taunt. 302.

^b *Hobbs v. Hannam*, 3 Camp. 93.

^c *Miller v. Warre*, 7 D. & R. 1. 4 B. & C. 538. (10 Eng. C. L. 405.)

^d *Kent v. Bird*, Cowp. 583.

^e *Mansfield v. Maidland*, 4 B. & A. 582. (6 Eng. C. L. 524.) *Palmer v. Pratt*, 2 Bing. 185. (9 Eng. C. L. 373.) 9 Moore, 358. But see *Tasker v. Scott*, *ante*, 1136.

SECTION IV.

RE-INSURANCE.—DOUBLE INSURANCE.

Re-insurance.

RE-INSURANCE is an insurance effected by an insurer for his own protection, on the risk which he has engaged to run; whereby the new insurers will be responsible to him to the amount of the re-insurance, in case of a loss. By 19 Geo. II, c. 37, s. 4, "no person shall make a re-insurance unless the insurer shall be insolvent, become bankrupt, or die; in either of which cases such insurer, his executors, administrators, or assignees may make re-insurance to the amount before by him insured; provided it be expressed in the policy to be a re-insurance." A re-insurance by a British subject on a foreigner, not in accordance with this enactment, is illegal, and the premium cannot be recovered back.^a But it seems that if an underwriter transfers *by parol to another, at a higher premium, his subscription to a policy, it is not such a re-insurance as is prohibited by the act.^b

*1139

Double insurance.

A double insurance is where the *insured* makes two insurances on the same risk and the same interest. Though made with a view of double satisfaction in case of a loss, it is not illegal; but the two policies are considered as making but one insurance, and the insurer can only recover the real amount of his loss to which all the underwriters on both shall contribute in proportion to their several subscriptions.^c The insured may recover the whole against any one of the insurers, and leave him to recover a rateable contribution from the others.^d In an action on a valued policy, it is no defence to prove that the insured has received the amount of the valuation from the underwriters on another policy, if the subject matter of insurance be proved to be of equal value to the sum received, and that sought to be recovered.^d

^a *Andrew v. Fletcher*, 2 T. R. 161. 3 *Id.* 266.

^b *Delver v. Barnes*, 1 Taunt. 48.

^c *Marshall*, 146. *Newby v. Reed*, 1 Bl. 416. *Rogers v. Davis*, Park. 423. S. P. 424. See *Irving v. Richardson*, 2 B. & Ad. 193. (23 Eng. C. L. 95.) 1 M. & Rob. 153.

^d *Bousfield v. Barnes*, 4 Camp. 228.

SECTION V.

OF THE FORM AND REQUISITES OF A POLICY OF INSURANCE.

	PAGE		PAGE
1. Of the form of the policy.		5. The commencement and termination of the risk.	1143
2. It must describe the name of the insured.	1140	6. The perils insured against.	1146
3. The name of the ship.	1141	7. The common memorandum.	1146
4. The subject matter of insurance.	1143	8. The stamp.	1147

1.—*Of the form of the policy.*] THE policy is a written instrument by which the contract of insurance is reduced into form; it is signed by the insurer or his agent; or in case of an insurance by a corporation, sealed with the corporate seal. Policies with reference to the *reality of the interest* of the insured, are distinguished into *interest* and *wager* policies, of which we have already treated; and with reference to the *amount* of interest *into *open* and *valued* policies, which will be considered hereafter. The form now in use is of great antiquity, and is said to have been introduced in England by the Lombards; it is generally printed, and though in its language it is inaccurate, ungrammatical and incoherent, merchants apprehensive of the danger attending every innovation in the forms of commercial contracts have always been particularly tenacious of the original of this instrument. We shall proceed to consider its principal requisites. *1140

2.—*The name of the insured.*] Formerly it was not usual or necessary to insert in the policy the name of the insured; but the practice of effecting policies in blank being found productive of many inconveniences, it was enacted by 25 Geo. III, c. 44, "that when the insured resided in Great Britain, his name, or that of his agent, should be inserted in the policy as the person interested; and when he resided abroad, the name of the agent should be inserted." When several persons were interested in an insurance, the courts held, in the construction of this statute, that all their names should be inserted in the policy;^a and when the principal resided abroad, that the agent should reside in Great Britain, and that his name should be inserted, *eo nomine*, as agent.^b The provisions of this act having been productive of much inconvenience to merchants, it was repealed by 28 Geo. III, c. 56; but it being still deemed advisable to restrain the making of policies in blank, it was provided by the latter statute, "that no person should effect any policy on any ship, goods, or other property, without first in- The name of the insured or his agent must be inserted in the policy.

^a Wilton v. Reaston, Park. 19. Cox v. Parry, 1 T. R. 464.

^b Pray v. Edie, 1 T. R. 313.

serting the names, or usual style and firm of dealing, of one or more of the persons interested in such assurance; or of the consignors or consignees of the property insured; or of the persons residing in Great Britain who receive the order for, and effect the policy, or of the persons who give the order to the agent immediately employed to effect the policy; and that every policy made contrary to the meaning of this act should be void." An insurance broker, employed to effect a policy, is a "sufficient agent within the meaning of this act," "as a person residing in Great Britain, who received the order to effect the policy."^a Where on a policy of insurance, the persons interested were denominated "the trustees of Messrs. K. and Co.;" held, that this might be considered their usual style and form of dealing within the statute 28 Geo. III, c. 56, s. 1.^b

*1141

Where directions to insure were given to the firm of *G. W. and Co.*, of London, and the policy was effected by the firm of *G. and Co.*, of Liverpool, but both firms had several partners in common; it was held to be sufficient compliance with the statute, and that a statement in the policy, that it was effected by *G. W. and Co.*, was substantiated.^c Where agents, to whom goods were transmitted, with the bills of lading, and a letter directing an ultimate consignment to other persons, "that they might have an opportunity to insure," effected an insurance on the goods themselves, upon their being rejected by the proposed consignees, which insurance was afterwards approved of by the principal; it was held to be a sufficient compliance with the statute, for the agents might be considered as the consignees of the principal, as they had the bills of lading in their possession, or they might be considered as the persons who had received the original order to insure.^d The subsequent adoption by a principal of an insurance by an agent is equivalent to a previous order.^e But a letter received by an agent, directing him to make an insurance, cannot be construed as an adoption of an insurance previously effected, for adoption presupposes knowledge of the act done.^f

3.—*The name of the ship.*] Every policy should contain a true description of the ship; a false description in this respect will vitiate the contract. It is usual to state the name of the vessel, and of the master; but to avoid the consequences of a "mistake, these words are generally inserted, "or whosoever else shall go for master in the said vessel, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named and called." So that if the identity of the ship

*1142

^a *Bell v. Gilson*, 1 B. & P. 345. It is not necessary that his name should be inserted as agent. *De Vignier v. Swanson*, *Id.* 346, n.

^b *Hibbert v. Martin*, 1 Camp. 538.

^c *Dickson v. Lodge*, 1 Stark. 226, (3 Eng. C. L. 367.)

^d *Wolff v. Horncastle*, 1 B. & P. 316.

^e *Id.* *Hagedorn v. Oliversen*, 2 M. & S. 485.

^f *Bell v. Janson*, 1 M. & S. 201.

be proved, and there be no evidence of fraud, a mistake in the name of the ship or master will not avoid the contract.^a When the ship is described in the policy, it becomes part of the contract that the adventure shall be on board that vessel; and another ship cannot be substituted for it, unless in case of necessity, or with the consent of the insurer.^b When the insured is unable to specify the name of the ship, the practice is to describe the conveyance as "ship or ships," and he may apply the insurance to any ship he thinks proper within the terms of it.^c

4.—*Subject matter of insurance.*] The policy must also specify the subject matter of insurance, whether it be a ship, goods, freight, bottomry or respondentia securities, or other things. An insurance on the ship does not comprehend the ship and cargo, but it extends to the ship's boat, rigging and ordinary stores;^d and provisions sent out for the ship's crew, are regarded as part of the ship's furniture.⁽¹⁾ Where goods are insured, it is not necessary that the particular kind of goods should be specified, yet it is sometimes done for the satisfaction of the underwriters. The general description in a policy on goods applies only to the cargo and merchandise on board, it does not protect the master's clothes, goods lashed on the deck, or jewels worn by persons on board.^f If the goods be particularly specified, the insurers will not be liable for the loss of property that does not correspond with the description.^g Bottomry and *respondentia*, must be insured under a particular denomination, and must be specially mentioned in the policy.^h *Freight must be described *eo nomine* in the policy.ⁱ *1143 But though as a general proposition, the subject matter of insurance must be properly described in the policy, yet the nature of the interest may be left at large, for it is a matter which only bears on the amount of the damages; therefore, where carriers on a canal effected an insurance for twelve months, on goods on board thirty boats named, between *L.* and *B.*, &c. with leave to take and discharge goods at all places on the navigation line, the insurance was agreed to be 12,000*l.* on goods, as interest might appear thereafter; held, that an insurance on goods was sufficient to cover the interest of the carriers in the large. But though the thing insured should be properly described; the nature of the interest may be left at large.

^a Hall v. Molineaux, 6 East, 385. Le Mesurier v. Vaughan, *Id.*

^b Marshall, 313. Plantamour v. Staples, 1 T. R. 611.

^c Kewley v. Ryan, 2 H. Bl. 343.

^d Hoskins v. Pickersgill, Park. 97. Marshall, 330.

^e Brough v. Whitmore, 4 T. R. 206.

^f Ross v. Thwaites, Park. 26. Marsh. 330.

^g Langhorn v. Cologan, 4 Taunt. 333. Marsh. 316.

^h Glover v. Black, 3 Burr. 1394. 1 Bl. 405.

ⁱ Hughes, 129.

(1) Whether the outfit of a whaling ship would be protected by a policy on cargo, *quære*; but the oil and other articles, which are the ordinary products of the voyage, are covered by such a policy. *Paddeck v. The Franklin Ins. Co.*, 11 Pick. 227.)

property under their charge; and that the policy was not exhausted when once goods to the value of 12,000*l.* had been carried by all the boats, or by each of them, but that it continued throughout the year, to protect all the goods afloat at any one time, up to the amount insured.^a

5.—*The commencement and termination of the risk.*] The voyage, with the names of the places at which the risk is to commence and terminate, should be accurately described, as also the places at which, and purposes for which, the ship is to touch, stay, and trade, when they would not otherwise be within the usual course of the voyage. A misdescription in this respect will vitiate the policy. Where a ship took in her cargo at *L.* and sailed to *G.*, and an insurance was made on the goods from *G.* to *D.*, “to begin from the loading;” it was held that the policy was void, as the description was calculated to induce a belief that *G.* was the port of loading.^b

Place of
loading.

*1144

A policy at and from *G.* on goods, beginning the adventure from the loading on board the ship, will not protect goods laden on board before the ship's arrival at *G.*^c A policy of insurance on goods “at and from Gottenburgh to Riga, beginning the adventure on the goods, from the loading thereof aboard the ship at Gottenburgh,” will not cover goods previously “loaded on board at London, which arrived in the ship at Gottenburgh.”^d A policy on goods, at and from *G.* to the ship's port of discharge, beginning the adventure on the said goods from the lading thereof aboard the said ship, will not cover goods loaded at an anterior port, though they were in a loaded state and in good safety at *G.* just before effecting the insurance.^e A ship insured from *A.* to *B.* sails with intent to touch at *C.*, an intermediate point; at a certain point the voyage is the same, from that point there are three tracks to *B.*, one by the way of *C.*, the two others by different courses; there are advantages and disadvantages attending each, and the captain must elect according to circumstances; the ship takes the track by *C.*, with intent to put in there, but is taken before she actually comes to the point where she must have turned out of the track to *B.* by the way of *C.*, for the purpose of putting into the harbour of *C.*; held, that the underwriter was discharged, because he was entitled to the advantage of the captain's judgment, in electing which of the three tracks it was best to pursue when he came to the first dividing point.^f

Where a policy of assurance was on goods at and from Pernambuco to Maranham, and from thence to Liverpool, beginning the adventure on the goods from the loading thereof on

^a *Crowley v. Cohen*, 3 B. & Ad. 478. (23 Eng. C. L. 124.)

^b *Hodgson v. Richardson*, 1 Bl. 463.

^c *Langhorne v. Hardy*, 4 Taunt. 628. *Spitta v. Woodman*, 2 Taunt. 416.

^d *Horneyer v. Lushington*, 15 East, 46. 3 Camp. 85.

^e *Mellish v. Allnutt*, 2 M. & S. 106.

^f *Middlewood v. Blakea*, 7 T. R. 162.

board the ship wheresoever; held, that it would cover goods previously loaded at Liverpool, and which arrived at *P.*, but were not unloaded there, and afterwards sustained a partial loss by wreck in the voyage from *P.* to *M.*^a A policy at and from Martinique, and all and every West India islands, warrants a voyage from Martinique to islands not in the homeward voyage.^b On a policy for four months, at and from a place, to any port or ports whatsoever; held, that an open roadstead (being the usual place of loading and unloading) was a port within the meaning of the policy.^c A policy on goods "at and from the ship's loading port or ports in Amelia Island to *London;" the ship never touched at Amelia Island, but took in her cargo at Tigree Island, which lies a little farther up the River St. Mary's; held, that the policy nevertheless attached, this being the usual mode in which ships in that trade take in their cargoes.^d A policy on goods at and from *G.* to any port in the Baltic, beginning the adventure from the loading thereof on board the ship, and the policy was declared to be in continuation of a former policy, which was a policy from *V.* to her port of discharge in the United Kingdom, or any ports in the Baltic, with liberty to take in and discharge goods wheresoever, to return twelve per cent. if the voyage ended at *G.*; held, that the assured were entitled to recover, although the goods were not loaded on board at *G.* but at *V.*, and although the defendant was not an underwriter on the former policy.^e

At and from several places.

*1145

Insurance on goods from *A.* to *B.*, "until they should be there discharged and safely landed;" on their arrival at *B.*, the merchant to whom the goods belonged, employed and paid a public lighter to land them, and the goods being damaged in the lighter, without negligence, the underwriters were held liable for the loss.^f The distinction seems to be, that if goods are put into a public lighter, for the purpose of being landed, they are protected by usage under a general policy; but if the merchant send his own lighter, the underwriter is discharged.^g Action on a policy on goods, "until the cargo should be discharged, and safely landed;" on the arrival of the ship, the goods insured were put on board a lighter hired in the usual way, and brought to the plaintiff's wharf in the evening, but not landed on account of the rough weather; the plaintiff then undertook to see to the landing-himself, but in the night the lighter was by an unavoidable accident sunk, and the goods lost; held, that the underwriters were discharged.^h

Landing the cargo.

The outward risk upon a ship ceases after she has been Termina-

^a Gladstone v. Clay, 1 M. & S. 418.

^b Bragg v. Anderson, 4 Taunt. 229.

^c Cockey v. Atkinson, 2 B. & A. 460.

^d Moxon v. Atkins, 3 Camp. 300.

^e Bell v. Hobson, 16 East, 240.

^f Hurry v. Royal Exchange Insurance Company, 2 B. & P. 430. 3 Esp. 289.

^g Rucker v. London Assurance Company, Marsh. 253. 2 B. & P. 432, n. and 3 Esp. 290.

^h Strong v. Nataly, 1 N. R. 16.

tion of the risk. *1146 moored at anchor twenty-four hours in the first port of an island to which she is destined; but an outward policy upon goods continues until they are landed.^a

An insurance on a ship to Jamaica is determined by the ship's mooring twenty-four hours in any port there, and does not continue till she comes to the last port of delivery.^b

Risk of freight.

The risk on freight does not attach until goods are actually shipped on board, or until there is an actual contract for shipping them.^c A homeward policy on freight at and from *A.*, attaches when the ship is at *A.*, in a condition to take in her homeward cargo.^d

6.—*Perils insured against.*] The perils insured against must also be inserted in the policy; they are generally expressed in the form of words which have been long in use, and which are so comprehensive, that there is scarcely any misfortune that can possibly happen in the course of a voyage which is not provided against. In all our policies are inserted the words "lost or not lost," by which the insurer takes upon himself not only the risk of future loss, but also the loss, if any, that may already have happened.⁽¹⁾ A policy of insurance on a ship "lost or not lost," executed, after the ship was known by all the parties to be lost, in pursuance of a previous agreement to insure, has been held to be valid.^f

7.—*Of the common memorandum.*] At the foot of the policy there is a memorandum inserted for the purpose of avoiding litigation about trivial losses, and protecting the underwriters from losses arising from the perishable quality of the goods insured. The usual memorandum in policies effected at Lloyd's, is as follows:—"N. B. Corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general, *or the ship be stranded*; sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average under *5l. per cent.*; and all other goods, also the ship and freight, are warranted free from average under *3l. per cent.*, unless general, or the ship be stranded." The term "corn," in the memorandum, includes, peas, beans,

^a *Barras v. London Assurance Company, and Leigh v. Mather*, Park. 44. 1 Esp. 411.

^b *Camden v. Cowley*, 1 W. Black. 417.

^c *Flint v. Flemyng*, 1 B. & Ad. 45. (20 Eng. C. L. 340.) *Forbes v. Aspinall*, 13 East, 323, ante, 1129.

^d *Williamson v. Innes*, 1 M. & Rob. 88.

^e *Marshall*, 332.

^f *Mead v. Davison*, 4 Nev. & M. 701. 3 Adol. & Ellis, 303. (30 Eng. C. L. 95.) 1 Har. & Woll. 156.

^g The words in italics are omitted in the policies of the Royal Exchange and London Assurance Companies.

(1) (*Coggeshall v. American Ins. Co.*, 3 Wend. 283. *Paddock v. Franklin Ins. Co.*, 11 227.)

malt, and other kinds of grain,^a but not rice;^b salt does not include saltpetre.^c Where there has been a stranding, the insured is entitled to recover for average losses, though the injury to the cargo does not result from the stranding.^d

8.—*Stamp.*] The policy must be duly stamped at the time when it is effected, otherwise it is an absolute nullity, and cannot be made available in any court of justice, for it cannot be legally stamped afterwards.^e By 3 & 4 W. IV, c. 23, s. 1, the duties granted by 55 Geo. III, c. 184, on sea insurances in England, and by 56 Geo. III, c. 56, in Ireland, are repealed, and the following scale of duties is substituted:—

If the policy be not duly stamped, it is void.

Policies upon ships, goods, merchandise, or any other interest, which may be legally insured for any voyage, other than a voyage from any port of the United Kingdom of Great Britain and Ireland, the islands of Guernsey, Jersey, Alderney, or the Isle of Man, to any other port or place in the said kingdom or islands.

	£	s.	d.
Where the premium <i>bond fide</i> paid or contracted for, shall not exceed the rate of 15s. per cent. on the sum insured. If the whole sum insured shall not exceed 100 <i>l</i>	0	1	3
And if the whole sum insured shall exceed 100 <i>l</i> ., *then for every 100 <i>l</i> ., and also for any fractional parts of 100 <i>l</i> ., whereof the same shall consist.	0	1	3
Where the premium shall exceed the rate of 15s. per cent., and shall not exceed the sum of 30s. If the whole sum insured shall not exceed 100 <i>l</i>	0	2	6
And if the whole sum insured shall exceed 100 <i>l</i> ., then for every 100 <i>l</i> ., and for any fractional part thereof	0	2	6
Where the premium shall exceed 30s. for every 100 <i>l</i> ., and any fractional part whereof the same shall consist.	0	5	0

*1148

But if the separate interests of two or more distinct persons shall be insured by one policy, then the said duty of 1*s.* 3*d.*, or 2*s.* 6*d.*, or 5*s.*, as the case may require, shall be charged thereon, in respect of each and every fractional part of 100*l*., as well as in respect of every full sum of 100*l*. thereby insured upon any separate interest.^f

^a *Mason v. Skurry*, Park. 179. *Moody v. Surridge*, *Id.* *Scott v. Bourdillion*, 2 N. R. 213.

^b *Journieu v. Boudieu*, 2 M. & S. 371. Park. 179.

^c *Id.*

^d *Burnet v. Kensington*, 7 T. R. 210. *Harman v. Vaux*, 3 Camp. 499. "General average," and "stranding," are considered under distinct heads. See post, 1172-6.

^e 35 Geo. III, c. 63, s. 14. *Roderic v. Hovil*, 3 Camp. 108. *Rapp v. Allnutt*, *Id.* 106.

^f If in such case the stamp be not sufficient to cover all the fractional parts, the policy

And for every policy of insurance upon any ship, freight, or any other interest which may be lawfully insured, for any certain period of time; the following rates for every 100*l.*, and also for any fractional part of 100*l.* whereof the same shall consist.

£ s. d.

Where any such insurance shall be made for any period not exceeding three calendar months.	0	2	6
Exceeding three calendar months	0	5	0

By sec. 4. of this act, all powers and provisions of former acts relating to duties on sea insurances, and not hereby expressly provided for, are preserved and kept in force.

*1149 By 35 Geo. III, c. 63, s. 11, the premium, or consideration, the risk or adventure insured against, the names of the underwriters, and the sums insured, shall be specified in the policy, or it will be void.

What alterations in a policy need not be stamped.

In general any alteration made in an instrument after it has been executed, will require a new stamp; but the 35 Geo. III, c. 63, s. 13, provides, "that the act shall not extend to prohibit the making any alteration which may lawfully be made in the terms or conditions of any policy of insurance, duly stamped, after the same shall have been underwritten, or to require any additional stamp duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, &c., and so that the thing insured shall remain the property of the same persons; and so that such alteration shall not prolong the term insured beyond the period allowed by this act; and so that no additional or further sum shall be insured by means of such alteration."^a

Decisions under the above statute.

It has been held, under this provision, that where goods and specie to a certain amount were insured by a policy on ship or ships which should sail on the voyage insured between the 1st of October 1799 and the 1st of June 1800, a memorandum written on the policy on the 11th of June, extending the time of sailing to the 1st of August, 1800, did not require a new stamp.^b So it has been held that a policy containing a warranty that the ship shall sail on or before a given day, may be altered, pending the risk, by a memorandum whereby the underwriters, in consideration of a further premium, agree to cancel the warranty, and to make a return of premium if the ship sail with convoy.^c So where, in a policy on goods at and from *S.* to *R.*, and the ship being driven into *W.* and detained, and the assured afterwards wrote to their agents in *L.* "that the captain had been ordered to proceed to *C.*; as they were not certain whether the enemy might be at *R.* or not, and that the

will be void; though the stamp be sufficient to cover the aggregate sum insured. *Rapp v. Alhutt*, 15 East, 601.

^a 35 Geo. III, c. 63, s. 13.

^b *Kensington v. Inglis*, (in Error,) 8 East, 273.

^c *Ridsdale v. Shedden*, 4 Camp. 107.

passage to *C.* was nearly the same, but rather the shortest and safest, and they desired the agents to arrange the matter with the underwriters," which letter the agents receiving on 12th July, applied to the *underwriters for their consent to alter the policy, by adding the words "*S.* or *M.*" after "*R.*" which consent was obtained, and the ship and goods were afterwards lost in the voyage to *C.*; held, that this alteration did not require a new stamp.^a So where a vessel having sailed, put back to the Downs, and then sailed again, and labored and strained much from being overloaded, and then put back a second time; and upon an application to the underwriters for liberty for the ship to go into port to discharge part of the cargo, it was only communicated to them that the ship was too deep in the water; held, that the memorandum giving such liberty did not require a new stamp.^b

*1150

A warranty may be waived by a memorandum on the policy, without a new stamp. As where a policy was effected upon hemp marked *R.* and by a subsequent memorandum the underwriters agreed to protect the hemp, though the mark was withdrawn; held, not to require a new stamp.^c So where a policy was effected on a ship on a voyage at and from Liverpool to Quebec; the ship being detained beyond the intended time of sailing, the following memorandum was indorsed on the policy, "The *Hebe* being unavoidably detained beyond the intended time of sailing, the voyage is changed, and the vessel proceeds from Liverpool to New Brunswick, and from thence to London, and in consideration of one guinea per cent., the underwriters agree to continue the risk until the vessel shall be arrived back in London, &c.;" held, that the memorandum was within the 13th sec. of the act, and did not require a new stamp.^d If by mistake a policy be effected in terms not conformable to the real intention of the parties, the mistake may be corrected without a new stamp.^e

But the statute does not sanction an alteration of the subject matter of insurance. The words, "the thing insured shall remain the property," &c., apply to one identical and continued subject matter all along remaining the property of the same proprietor. *Therefore, where the original policy was "on ship and outfit" at and from London to the South Seas, during the ship's stay and fishing there, and at and thence to Great Britain, &c.; and after the ship had sailed on the voyage insured, by consent of the underwriters the policy was altered, and declared to be on the ship and goods, instead of ship and outfit. It was held, that as the outfit for such a voyage as was described in the policy, differed materially from what was comprehended under

*1151

^a *Ramstrom v. Bell*, 5 M. & S. 267.

^b *Weir v. Aberdeen*, 2 B. & A. 320.

^c *Hubbard v. Jackson*, 4 Taunt. 169.

^d *Broekelbank v. Sugrue*, 1 B. & Ad. 81. (20 Eng. C. L. 251.) 1 M. & Rob. 109.

^e *Robinson v. Touray*, 1 M. & S. 217. 3 Camp. 160. *Sawtel v. London*, 5 Taunt. 359. (1 Eng. C. L. 133.)

the term goods, the policy in its altered state required an additional stamp within the meaning of the act.*

A material alteration will avoid the policy.

Independently of the stamp laws, at common law any material alteration made in the instrument by one of the parties, without the consent of the other, rendered it void and incapable of being enforced in any court of justice.^a Thus, where a policy from Calmar to Portsmouth, was altered with the consent of some of the underwriters, by inserting the words, "or Weymouth" after Portsmouth; held, that the policy was void against an underwriter who was ignorant of the alteration when it was made, although afterwards, on being informed of it, he said he would not take advantage of it.^b So where a policy was executed in the printed form, without any specific subject of insurance being inserted in writing, and the subject matter was afterwards added in writing, and the addition signed by some of the underwriters only; it was held, that the assured could not recover against those underwriters who did not so sign, on the contract as it stood altered by the insertion.^c But it has been held that a policy "at and from A. and B," was not vitiated by inserting, without the consent of the underwriters, the words "both or either;" for the alteration was immaterial, it did not affect the legal operation of the instrument.^d

*1152

*SECTION VI.

VALUED AND OPEN POLICIES.

Valued policy.

A VALUED policy is where the subject insured is estimated at a certain sum, which is inserted in the policy, as liquidated damages; to save the necessity of proving the value in case of a total loss. The effect of a valuation is to fix the amount of interest in the same manner as if the insurer were to admit it at the trial.^e(1)

^a *Hill v. Patten*, 8 East, 373. It was afterwards held that the assured could not recover upon the policy in its original state; an assurance on "ship and outfit," by reason of the alteration apparent on the face of the instrument having been made by the parties interested. *French v. Patton*, 9 East, 351.

^b See *ante*, 656. *Forshaw v. Chabert*, 3 B. & B. 158. (7 Eng. C. L. 389.) *Fairlie v. Christie*, 7 Taunt. 416. (2 Eng. C. L. 159.) *French v. Patton*, 9 East, 351.

^c *Campbell v. Christie*, 2 Stark. 64. (3 Eng. C. L. 246.)

^d *Langhorn v. Cologan*, 4 Taunt. 330.

^e *Clapham v. Cologan*, 3 Camp. 382. *Sanderson v. Symons*, 4 Moore, 42.

^f A valued policy of insurance is not to be considered as a wagering policy, *Lewis v. Rucker*, 2 Burr. 1167, unless it dispenses with all proof of interest; as where a policy stipulated that the goods insured were and should be valued at five tierces of

(1) (*Patapasco Ins. Co. v. Biscoe*, 7 Gill & Johns. 293.)

An open policy is where the amount of the interest insured is not fixed in the policy, but is left to be ascertained by the insured, in case of a total loss. When a power is given to the insured of declaring the value of the subject matter, after the policy is effected, the declaration of interest, to be available, must be communicated to the underwriters, or some one on their behalf, before intelligence is received of the loss; but the declaration of interest is not a condition precedent, and if none is made, the policy is then open instead of being valued, and upon proof of interest at the trial, the assured will be entitled to recover.^a

In case of a valued policy, the general rule is, that if, by one of the perils insured against, there be a total loss of the subject matter of insurance, the insured is entitled to recover the whole sum at which the cargo was valued; but where a partial loss only is sustained, as if part only of the cargo be on board at the time of the loss, the valuation must be opened, and the insured can only recover a proportionate share.^b If goods are fraudulently overvalued in a policy of insurance, with intent to cheat the underwriters, the contract is entirely vitiated, and the assured cannot recover even for the value actually on board.⁽¹⁾

*1153

SECTION VII.

CONSTRUCTION OF POLICIES.

IN the construction of covenants the following observations of a distinguished judge are worthy of particular attention; they contain every thing that can be usefully said upon the subject. "The same rule of construction, which applies to all other instruments,^d applies equally to a policy of assurance, viz., that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject matter, as by the known usage of trade or the like, acquired a

coffee valued at 27*l. per tierce*, say 135*l.*, that the policy should be deemed a sufficient proof of interest; held, that it was a wagering policy, and void under 19 Geo. II, c. 37, *ante*, 1133. *Murphy v. Bell*, 4 Bing. 567. (15 Eng. C. L. 74.) 1 M. & P. 493.

^a *Harman v. Kingston*, 3 Camp. 150.

^b *Forbes v. Aspinall*, 13 East, 323. *Forbes v. Cowie*, 1 Camp. 520. *Rickman v. Carstairs*, 5 B. & Ad. 651. (27 Eng. C. L. 147.) 2 N. & M. 562. But see *Montgomery v. Eggington*, 3 T. R. 362.

^c *Haigh v. De La Cour*, 3 Camp. 319. And see *Amery v. Rogers*, 1 Esp. 207.

^d See *ante*, 613.

(1) (See *Clerk v. The Ocean Ins. Co.* 16 Pick. 289.)

peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments in this respect is, that the greater part of the printed language of them being invariable and uniform, has acquired, from use and practice, a known and definite meaning, and that the words superadded in writing, subject indeed always to be governed in point of construction by the language and terms with which they are accompanied, are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties for the expression of their meaning, and the printed words are a general formula adapted equally to their case, and that of all other contracting parties upon similar occasions and subjects.”^a

*1154
Evidence
admissi-
ble to
explain
policies.

Proof of usage is inadmissible to vary or qualify the terms of the policy, as in the case of any other written instrument;^b but parol evidence is admissible to explain doubtful phrases and mercantile usage, for the purpose of applying the instrument to its proper subject matter.⁽¹⁾ By the known usage of trade, is meant the general usage of the whole trade, in the place where the policy is effected, and not the particular usage of any more limited class of persons; therefore the usage among underwriters at Lloyd’s Coffee-house, will not conclude persons who are not in the habit of resorting thither for the purpose of effecting insurances.^c And in an action on a policy on a voyage “at or from the port or ports of discharge and loading in India and the East India Islands,” evidence was admitted to show that the Mauritius was considered in mercantile contracts as an East India island, although treated by geographers as an American island.^d

It has been established by several cases,^e that where the policy was upon goods “from the loading thereof,” either at a particular place or in blank, upon a voyage from one place to another, it does not attach upon goods previously on board; but this being a strict construction has been relaxed, where

^a Per Lord Ellenborough, C. J., in *Robertson v. French*, 4 East, 135.

^b *Parkinson v. Collier*, Park. 470. *Haines v. Knightly*, 3 Salk. 444.

^c *Gabay v. Loyd*, 3 B. & C. 793. (10 Eng. C. L. 229.)

^d *Robertson v. Money*, R. & M. 75. (21 Eng. C. L. 303.) *Uhde v. Walters*, 3 Camp. 16. But the Court of Common Pleas afterwards decided that the Mauritius was not an East India island. *Robertson v. Clark*, 1 Bing. 445. (8 Eng. C. L. 373.)

^e *Robertson v. French*, 4 East, 130. *Spitta v. Woodman*, 2 Taunt. 416. *Horneyer v. Lushington*, 15 East, 46. *Langhorn v. Hardy*, 4 Taunt. 630.

(1) (*Turner v. Burrowes*, 8 Wend. 144. *Dow v. Whetton*, Ibid, 160. *Allegre v. The Maryland Ins. Co.*, 2 Gill & Johns. 136. *Fowler v. Essex Fire Ins. Co.*, 7 Wend. 270.)

there was anything upon the face of the instrument to satisfy the court that the policy was intended to cover goods previously on board. Thus where the policy was declared to be "in continuation of others," which were upon a voyage to the port from which the risk insured began;^a and where the words used were, "wheresoever, &c.;" it was held, that the insurance "was not confined to goods put on board in the course of the voyage insured."^b "The question in policies and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used."^c *1155

SECTION VIII.

OF LOSS BY THE PERILS INSURED AGAINST.

	PAGE		PAGE
1. Loss by perils of the sea.		4. Loss by arrests and deten-	
2. ——— fire. . .	1158	tion of princes. . .	1161
3. ——— capture. . .	1158	5. ——— barratry. . .	1162

1. *Loss by perils of the sea.*] A loss in insurance signifies the injury sustained by the insured, in consequence of the happening of one or more of those events or accidents against which the insurer has undertaken to indemnify him. Those events or *perils*, as they are usually denominated, are enumerated in every policy; and no loss, however great, can be with- in the policy unless it be the direct or immediate consequence of one or more of those perils.^d We shall consider separately each of the perils, or causes of loss, usually insured against.

Losses by perils of the sea, are those which are necessarily incidental to a ship engaged in a sea voyage, that is, such as arise from stress of weather, winds and waves, lightning and tempests, rocks, sands, and other natural causes.

A loss occasioned by another ship running down the ship insured, through gross negligence or running foul of her, is a *Running down* loss by perils of the sea.^e The underwriters on a policy are liable for a loss arising immediately from perils of the sea, such as the winds and waves, although remotely, from the mismanagement and negligence of the master and mariners;^f

^a Bell v. Hobson, 16 East, 240.

^b Gladstone v. Clay, 1 M. & S. 418.

^c Per Lord Denman, C. J., in delivering the judgment of the court in Rickman v. Carstairs, 5 B. & Ad. 663. (37 Eng. C. L. 147.)

^d Marshall, 485.

^e Smith v. Scott, 4 Taunt. 126. Buller v. Fisher, 3 Esp. 67.

^f Walker v. Maitland, 5 B. & A. 171. (7 Eng. C. L. 59.)

as where a ship was stranded in consequence of the watch falling asleep.

- *1156 "So, if a ship be wrecked through the barratry of the master or mariners.^a So where a government transport was insured for twelve months, during which she was ordered into a dry harbour, the bed of which was hard and uneven, and on the tide having left her, she received damage by taking the ground; it was held to be a loss by a peril of the sea.^b So where living cattle, warranted "from mortality and jettison," were killed by the rolling of the ship.^c So where horses, warranted "free from mortality," broke down the partitions between them, in consequence of a storm, and by kicking bruised each other so much that they died; it was held to be a loss by the perils of the sea.^d So where a vessel was wrecked, and a portion of the goods was saved, but never came into the possession of the owners.^e So where a press-gang seized two of the mariners who had been despatched to cast off a rope, while the ship was moving from port to port in a harbour, and the vessel in consequence ran ashore; it was held to be a loss by the perils of the sea.^f So where a ship was stranded and lost, and while she lay in the sand she was seized, and the goods were confiscated; held to be a loss by the perils of the sea.^g

Ship
missing.

- A ship which is missing, and of which no intelligence has been received within a reasonable time after sailing, shall be presumed to be lost by foundering at sea.^h There is no fixed rule of law with regard to the time after which a missing ship shall be reputed to be lost; it is in all cases a question of presumption, to be governed by the circumstances of the particular case.ⁱ But to found a presumption that the ship was lost on the voyage, it is not enough to prove that she was not heard of in this country after she sailed, without calling witnesses from her port of destination, to show that she never arrived there.^j Where, in *assumpsit* on a policy of insurance on goods by a certain *ship, it was proved that she sailed on the voyage insured with the goods on board, and never arrived at her port of destination; and that a few days after her departure, a report was heard at the place whence she sailed, that the ship had foundered at sea, but that the crew were saved; held, that this was sufficient *prima facie* evidence of a loss by perils of the seas, and that the plaintiff was not bound to call any of the

^a Heyman v. Parish, 2 Camp. 149.

^b Fletcher v. Inglis, 2 B. & A. 315.

^c Lawrence v. Aberdeen, 5 B. & A. 109. (7 Eng. C. L. 38.)

^d Gabay v. Lloyd, 3 B. & C. 793. (10 Eng. C. L. 229.) 5 D. & R. 641.

^e Bondrett v. Hentigg, Holt, 149. (3 Eng. C. L. 57.)

^f Hodgson v. Malcolm, 2 N. R. 336.

^g Hahn v. Corbett, 2 Bing. 205. (9 Eng. C. L. 383.)

^h Newby v. Read, 1 Park. Ins. 106.

ⁱ Houstman v. Thornton, Holt, 242. (3 Eng. C. L. 88.) And see Marshall v. Parker, 2 Camp. 70.

^j Twemlow v. Oswin, 2 Camp. 85.

crew, or to show that he was unable to procure their attendance.^a Where a loss by the perils of the sea is to be inferred, from the ship not being heard of after her sailing, the plaintiff must prove, that when she left the port of outfit, she was bound upon the voyage insured. For this purpose the convoy-bond, mentioning the port of destination in the common form, is *prima facie* evidence.^b

But if the loss be occasioned by some extrinsic or collateral force, and the perils of the sea be not the immediate, but the remote cause of it, the insurer will not be liable as for a loss by the perils of the sea, though it may happen on the sea. Thus, where a ship was blown over on her side and damaged, while she was in the graving dock for the purpose of repair; it was held not to be a loss by the perils of the sea, though the insurer was liable as it fell within the general words of the policy.^c So where a ship was hove down for repairs on a beach within the tide-way, and much bilged in consequence of the shore, which supported it, being forced away by the tide; it was held not to be a loss by the perils of the sea.^d So a loss by worms or rats eating holes in the ship is not a loss by perils of the sea.^e On a policy upon goods, where the ship was disabled from pursuing her voyage by perils of the sea, and obliged to put into port to be repaired, the master, having no other means of raising money to defray the expenses of such repairs, sold part of the goods, and applied the proceeds in payment of these expenses; held, that the underwriter was not answerable for ^{*the loss.}^f So where a vessel was driven by tempestuous weather into a foreign port, and in order to defray the expenses of repairing, (without which she could not have proceeded on her voyage,) the captain was obliged to sell part of the cargo; held, that the underwriters were not liable for a total loss by perils of the sea.^g For in these cases the perils of the sea were not the immediate cause of the loss; the sale of the goods was rendered necessary, not by the perils of the sea but by the inability of the captain to find money in any other way to repair the ship. Where a merchant ship was fired at sea by a British ship of war, who mistook her for an enemy, and the goods were sunk; held, not to be a loss by the perils of the sea, though the underwriters were liable, as it was a loss within the policy.^h

The underwriters of a policy are not liable for the wages

^a *Koster v. Reed*, 6 B. & C. 19. (13 Eng. C. L. 97.) 9 D. & R. 2.

^b *Cohen v. Hinckley*, 2 Camp. 51.

^c *Phillips v. Barber*, 5 B. & A. 161. (7 Eng. C. L. 55.)

^d *Thompson v. Whitmore*, 3 Taunt. 228.

^e *Rohr v. Par*, 1 Esp. 445. *Hunter v. Potts*, 4 Camp. 203.

^f *Powell v. Gudgeon*, 5 M. & S. 431.

^g *Sarquy v. Hobson*, 3 D. & R. 192. 2 B. & C. 7. (9 Eng. C. L. 5.) 4 Bing. 131. (13 Eng. C. L. 374.) 1 Y. & J. 347.

^h *Cullen v. Butler*, 4 Camp. 269. 5 M. & S. 461.

Liability
of under-
writers.

and provisions of the crew of the ship during its detention for the purpose of repairing damages sustained by the perils of the sea, nor are they liable for damages which the court of admiralty compelled the owners of the insured ship to pay for injuries occasioned in consequence of a collision by stress of weather with another vessel; for such damages are not a necessary or a proximate effect of the perils of the sea; they grow out of an arbitrary provision in the law of nations, from views of general expediency, and can no more be charged on the underwriters than a penalty incurred for a contravention of the revenue laws of any particular state which may have been rendered inevitable by perils insured against.^a

2.—*Loss by fire.*] Fire is one of the perils enumerated in the policy. "If the vessel or goods be destroyed by fire, it is immaterial whether the fire is occasioned by a common accident, or by lightning, or by an act done in duty to the state. Nor can it make any difference whether the ship was thus destroyed by third persons subjects of the king, or by the captain and crew, acting with loyalty and good faith. Fire is still the *causa causans*, and the loss within the perils insured against."^b Therefore where the captain of a ship insured burned her to prevent her falling into the hands of the enemy, it was held to be a loss by fire within the meaning of the policy.^c So if a ship be burned through the negligence of the master and the mariners.^d (1) But if goods be burned in consequence of being put on board in bad condition, it is not a loss by fire.^e

*1159

3.—*Loss by capture.*] A loss by capture occurs when a ship or goods are taken by an enemy, in open war.⁽²⁾ In every case of capture, the insurer is answerable to the extent of the sum insured for the loss actually sustained. This may be either total, as where the thing insured is not recovered again; or partial, as where the ship is recaptured or restored before abandonment; in which case the insurer is bound to pay the salvage and any other necessary expense which may have been incurred by the party for the recovery of his property.^f

What constitutes a
loss by
capture.

To constitute a loss by capture, it is not necessary that the ship should be condemned or carried into any port or fleet of the enemy.^g A vessel driven on an enemy's coast, and there taken, is lost by capture.^h Proof of capture by collusion

^a *Devaux v. Salvador*, 6 Nev. & M. 713.

^b Per Lord Ellenborough, C. J., in *Gordon v. Rinnington*, 1 Camp. 123.

^c *Id.*

^d *Busk v. Royal Exchange Assurance Company*, 2 B. & A. 73.

^e *Boyd v. Dubois*, 3 Camp. 133. Marsh. 495

^f Per Lord Mansfield, C. J., in *Goss v. Withers*, 2 Burr. 694.

^g *Green v. Elmslie, Peake*, 212.

(1) (*Waters v. The Merchants' Louisville Ins. Co.*, 11 Peters, 213.)

(2) (*Lowering v. The Mercantile Ins. Co.*, 12 Pick. 348.)

between the master of the ship and the commander of the capturing ship will support an averment of loss either by capture or barratry.^a

Every insurance on alien property by a British subject must be understood with this implied exception, that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assurer.^b Therefore, an insurance effected in Great Britain, on a French ship, previous to the commencement of hostilities between Great Britain and France, does not cover a loss by British capture.^c *Primâ facie*, a capture amounts to a total loss; and if the captors continue to hold possession, or even though a recapture takes place, if the ship be under a disability to complete her voyage, and the adventure be not only retarded but destroyed, the underwriters will be liable for a total loss if notice of abandonment be given when necessary.^d On the other hand, when a recapture takes place, and the ship is enabled to proceed to her place of destination, although a total loss has happened as far as regards the risk insured, yet if that loss be reduced by subsequent circumstances, the insurer will be liable for a partial loss only, even though notice of *abandonment be given; for the insured can only recover an indemnity according to the nature of his case at the time of the action brought.^e "A capture is an event which may or may not terminate in a total loss; if it continue and terminate in a total loss, the assured will be entitled to his full indemnity; but if the capture be only temporary, and the loss partial, it would be against the spirit as well as the letter of the contract, to hold the underwriter bound to take to the subject-matter insured, and to allow the assured, who stipulates only for an indemnity, to come upon the underwriter for the whole amount of his subscription, while the subject-matter insured subsists in perfect safety."^f

*1160

The underwriters are liable not only for the loss strictly occasioned by the capture but also for salvage, and other charges fairly and *bond fide* incurred by the insured, for the preservation of his property.^g But the insured is not entitled to an indemnity in respect of an illegal transaction. Formerly it was a common practice to agree with the captors for ransom of the vessel, and insurers were held liable for claims arising from such agreements. But this practice having been found to

^a Arcangelo v. Thompson, 2 Camp. 620.

^b Brandon v. Curling, 4 East, 410. 1 Smith, 85.

^c Furtado v. Rodgers, 3 B. & P. 191. Gamba v. Le Mesurier, 4 East, 407.

^d Goss v. Withers, 2 Burr. 683. Milles v. Fletcher, Doug. 219. Rotch v. Edie, 6 T. R. 413. Hughes on Ins. 224. M'Iver v. Henderson, 4 M. & S. 576.

^e Hamilton v. Mendez, 2 Burr. 1198. Bainbridge v. Nelson, 10 East, 228. Paterson v. Ritchie, 4 M. & S. 393. Brotherstone v. Barber, 5 M. & S. 418. Parsons v. Scott, 2 Taunt. 363.

^f Per Bayley, J., in 5 M. & S. 493.

^g Berons v. Rucker, 1 Bl. 313.

be impolitic and inconvenient, it was prohibited by statute, whereby ransom agreements are declared to be void.^a

Evidence
of cap-
ture.

A sentence of condemnation is not evidence without first proving a capture.^b Lloyd's books are evidence of a capture; but not of notice of a loss to any person in particular, but may go, coupled with other evidence, to the jury.^c If an insured declare upon a total loss by capture, and after proving a capture show a recapture, upon which proceedings were had in an Admiralty Court, he cannot recover without proving the proceedings in the Admiralty Court under seal, though he only

*1161

claim the amount of the loss sustained by the salvage proceedings and sale.^d

What con-
stitutes a
loss by ar-
rest or de-
tention.

4.—*Loss by arrests and detention of princes, &c.*] By the terms of the policy, the insurer undertakes to indemnify the insured against losses occasioned by "arrests or detentions of all kings, princes, and people of what nation, condition, or quality soever." The distinction between arrest of princes, and capture, is that the object of the latter is a prize, and that of the former, detention, with a design to restore the ship or goods detained, or pay the value to the owner. The most frequent cause of detention is an embargo, which is a proclamation or order of the state usually issued in time of war, prohibiting ships departing from or entering into the ports of that state until further order.^e The word "people," in the policy, means the governing power of the country; therefore, where a ship was seized by a tumultuous rabble, who compelled the captain to sell the cargo at their own price, which was much below its value; it was held, that the insurer was not liable as for a loss occasioned "by arrests and detentions of the people."^f

Where ships were seized and unladen by military force acting under the orders of a foreign government, then at peace with this country, but without the fault of the insured; it was held, a loss by detention.^g

A policy of insurance on a ship and stores "at and from a port" in a foreign country, in the common form, extends to an embargo laid on by the government of that country in the loading port; and if the embargo continue, the assured may abandon and recover as for a total loss.^h So, the seizure of a British vessel by one of his Majesty's ships of war, under an apprehension that she belonged to an enemy, is a loss within this branch of the policy.ⁱ It is no answer for the underwriters to

^a 29 Geo. III, c. 25. ³³ Geo. III, c. 66, ss. 37, 38. ⁴³ Geo. III, c. 140, ss. 24, 25. See *Havelock v. Rockwood*, 8 T. R. 268. *Parsons v. Scott*, 2 Taunt. 363.

^b *Marshall v. Parker*, 2 Camp. 69.

^c *Abel v. Potts*, 3 Esp. 243.

^d *Thellusson v. Sheddin*, 3 N. R. 238.

^e *Marsh*, 506-8.

^f *Newbitt v. Lushington*, 4 T. R. 782.

^g *Mellish v. Andrews*, 15 East, 33.

^h *Rotch v. Edie*, 6 T. R. 413.

ⁱ *Hagedorn v. Whitmore*, 1 Stark. 140. (3 Eng. C. L. 226.)

say that the arrest and detention were "unjustifiable." But the underwriters are not liable for a loss occasioned by the neglect or default of the insured himself; as where a ship was seized as forfeited on account of repeated acts of barratry by the mariners, in carrying smuggled goods on board, through the neglect of the owners; it was held, not to be a loss within the policy;^b nor will the underwriters be liable unless the loss takes place within the period embraced by the policy; as in the case of a policy on goods, "until discharged and safely landed," the liability of the insurers is discharged, when the goods have reached their port of destination and are lodged in the government warehouse there, although the goods are afterwards confiscated by the government.^c

In case of a detention of a neutral ship by a foreign power, all the charges consequent thereon must be borne by the underwriter, though such detention may be wrongful.^d If a suit is commenced in a foreign port against the captain on account of smuggling, whereby the ship is delayed, there being no suit against the ship; it is not a detention for which the underwriters are liable.^e

To support an averment in a declaration on a policy of insurance on goods, that the ship with the goods on board, when at *A.* was arrested by the persons exercising the powers of government there, and the goods were then and there by the said persons seized, detained, and confiscated, it is enough to show that the goods were forcibly taken from on board the ship by the officers of government, and never delivered to the consignees, without putting in any sentence of condemnation.^f

5.—*Loss by barratry.*] The term barratry is derived from the Italian word *barratrare*, to cheat; it includes, in general, every species of fraud, knavery, or criminal misconduct in the master or mariners, by which the freighters or owners are injured;^g as by running away with the ship, sinking or deserting her, embezzling the cargo, smuggling, running the ship on shore, or any other offence whereby the ship or the cargo may be subjected to arrest, detention, loss, or forfeiture.⁽¹⁾ Barratry can only be committed against the owner of the ship and against his consent. The general freighter is considered owner *pro hac vice*; therefore, *A.* being the owner of a ship, let it out to *B.* as freighter, who insured it for the voyage, and the barratrous act, whereby the vessel was lost, was committed with the knowledge of *A.*; held, that as it was unknown to *B.*, he

What constitutes a loss by barratry.

*1163

^a Mullett v. Shedden, 13 East, 304.

^b Ripon v. Cope, 1 Camp. 434.

^c Brown v. Carstairs, 3 Camp. 161.

^d Salouca v. Johnson, 1 Park. Ins. 125.

^e Bradford v. Levy, R. & M. 331. 2 C. & P. 137. (12 Eng. C. L. 58.)

^f Carruthers v. Gray, 3 Camp. 142. 15 East, 35.

^g Per Willes, C. J., in Lockyer, v. Offley, 1 T. R. 259.

might recover against the underwriter for a loss by barratry.^a So, where the owner of a vessel, fully laden by the freighters, colluded with the captain to run her on shore; held, that this amounted to barratry, although by the terms of a charter-party entered into between such owners and the freighters, the former was entitled to put goods on board during a previous part of the voyage.^b And on the same principle, if the insurance be made by and in favor of the ship-owner, and the barratrous act is committed with the privity of the freighter, the underwriter is not discharged, unless he can show that the ship-owner also was privy to the barratry.^c

A deviation, if fraudulent, is barratry; but if done through the ignorance of the captain, or from any other motive not fraudulent, it does not constitute an act of barratry, though it avoids the policy.^d Barratry may be committed even by dropping anchor,^e or delaying the voyage for a fraudulent or criminal purpose.^f

If a captain, contrary to the instructions of his owner, cruize for and take a prize, and the vessel be afterwards lost in consequence of it, it is an act of barratry, upon which the assured
 *1164 *may recover against the underwriters, although the captain libelled the prize for the benefit of the owner as well as himself.^g

To constitute barratry the act must be done without the consent of the owner.

It is not essential that the captain should derive or expect to derive a benefit from the transaction, in order that it may constitute barratry, if the act be illegal and done without the consent of the owner. Where the master sailed out of port, without paying the port duties, whereby the ship was forfeited; it was held to be barratry.^h So where the master, under general instructions from his owners to make the best purchases with despatch, went into an enemy's port, and traded there, on account of which illegal traffic, the vessel insured was seized by a king's ship, and afterwards condemned; it was held to be barratry, although it did not appear that the master would have been benefited by the act, or that he thereby intended any thing else than to make the cheapest and speediest purchases for his employers.ⁱ Where prisoners of war rose in the ship and confined all the crew except one, who was heard on the deck in conversation with them; it was held, to be evidence of barratry to go to the jury.^j

^a Vallijo v. Wheeler, Cowp. 143.

^b Soares v. Thornton, 1 Moore, 373. (5 Eng. C. L. 29.)

^c Boutefflower v. Wilmer, S. N. P. 953.

^d Phyn v. Royal Exchange Assurance Company, 7 T. R. 505. "A mere mistake by the captain, or a misapprehension as to the best mode of acting under his instructions and carrying them into effect, does not amount to barratry." Per Abbott, C. J., in Bottomly v. Bovil, 5 B. & C. 212. (11 Eng. C. L. 204.)

^e Roas v. Hunter, 4 T. R. 33.

^f Roscow v. Corson, 8 Taunt. 684. (4 Eng. C. L. 246.)

^g Moss v. Byron, 6 T. R. 379.

^h Knight v. Cambridge, 1 Stra. 581, cited 8 East, 135.

ⁱ Earle v. Rowcroft, 8 East, 196.

^j Hucks v. Thornton, Holt, 30. (3 Eng. C. L. 13.)

We have seen that the underwriters cannot be charged with a loss through barratry, if the act be committed with the consent of the owner of the ship; it is further to be observed, that if, through the negligence of the owner of a ship insured, the mariners barratrously carry smuggled goods on board, whereby the ship is seized as forfeited, the underwriters are not liable for the loss.^a An allegation of loss by barratry is supported by proof that it had happened by the act of an enemy and by barratry jointly.^b

A count on a policy of insurance laying the loss by capture, is sustained by evidence that the ship was captured by a privateer; although this happened from a collusion between the master of the ship and the commander of the privateer, and the *plaintiff might have recovered under a count laying the loss by the barratry of the master.^c *1165

SECTION IX.

TOTAL LOSS AND ABANDONMENT.

	PAGE		PAGE
1. Actual total loss.		4. When abandonment will	
2. Constructive total loss.	1166	not avail.	1170
3. Nature and operation of abandonment.	1166	5. Notice of abandonment.	1179
		6. Effect of abandonment.	1173

1.—*Total loss*, within the meaning of the policy, is either *actual* or *constructive*: an actual loss is where the goods insured are, before they arrive at their place of destination, either absolutely annihilated by the perils insured against, or, though subsisting in species, so circumstanced, that it is out of the power of the insured to render them beneficially available. As where hides were so damaged by the perils of the sea that a process of fermentation and putrefaction commenced, whereby their total destruction, before their arrival at the port of destination, became inevitable, but before the destruction was consummated the master of the vessel sold them; the Court of Exchequer Chamber held, that it was an actual total loss.^d What constitutes an actual total loss.

"If," said Lord Abinger, C. B., in delivering the judgment of the court, "goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are

^a *Pipon v. Cope*, 1 Camp. 434.

^b *Toulmin v. Anderson*, 1 Taunt. 227.

^c *Arcangelo v. Thompson*, 2 Camp. 620.

^d *Roux v. Salvador*, 3 Bing. N. C. 281, (32 Eng. C. L.) (in error,) reversing the decision of the Court of Common Pleas, S. C. 1 Bing. N. C. 526, (27 Eng. C. L. 481,) *post*, 1167, where it was held to be a *constructive* total loss. *Dyson v. Rowcroft*, 3 B. & B. 474.

by reason of that damage in such a state, though the skins be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel; if it be certain that before the termination of the original voyage the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers, not under the control of the assured; if
 *1166 by *any circumstance over which he has no control, they can never, or within no assignable period be brought to their original destination; in any of these cases the circumstance of their existing in species at that forced termination of the risk is of no importance, the loss is in its nature total to him who has no means of recovering the goods, whether his inability arises from their annihilation, or from any other insuperable obstacle."^a There is a total loss of the ship, if, by any of the perils insured against, it be rendered of no use whatever, though it be not entirely annihilated."^b(1)

Where, by means within the reach of the master, a ship can be treated so as to retain the character of a ship, he cannot, by selling her, even *bonâ fide*, convert the average into a total loss, for the underwriters are entitled to have those means used on their account.^c

2. *A constructive total loss* is where, by one of the perils insured against, as by a capture, or embargo, or by the vessel being deserted by the crew on account of its perilous state, the voyage is frustrated, though there is a chance of the recovery of the goods; or where the goods, though existing in species, are so deteriorated as not to be worth the expense of bringing them to their destination; in all such cases the insured may entitle himself to recover as for a total loss, by giving notice of abandonment to the insurer. The fair inference from the authorities is that, where it is out of the power of the insured or of the underwriter to procure the arrival of the subject matter insured, in species, at its place of destination, there is an actual total loss; but it cannot be considered an actual total loss whilst there is a *spes recuperandi*, or possibility, however re-

^a Per Lord Abinger, C. B., 3 Bing. N. C. 279. (32 Eng. C. L.)

^b Per Lord Ellenborough, C. J., in *Cologan v. London Assurance Company*, 5 M. & S. 455.

^c *Gardiner v. Salvador*, 1 M. & Rob. 116.

(1) (Where a vessel is sunk in the sea, it affords strong *prima facie* evidence of total loss, because it would in general preclude all hope of recovering her. But submersion, like stranding or other serious disaster, is to be taken in connection with other circumstances in determining whether the loss is or is not total. These circumstances, amongst others, are, the depth of the water, the distance from shore, the condition of the bottom, whether soft or rocky, the roughness or smoothness of the sea, the season of the year, and whether the means of relief are at hand. The ultimate question is, can she be raised and repaired at a reasonable expense of time and money; as in case of stranding the question is, can she be got off and repaired at a reasonable expense. Per Shaw, C. J., in *Swell v. The U. S. Ins. Co.*, 11 Pick. 94.)

note, of the thing insured arriving in its form and species at its destination.(1)

3.—*Nature and operation of abandonment.*] The distinction between an actual and constructive total loss is, that in the former case the insured is entitled to recover from the underwriter the whole sum insured without abandoning; whereas, in the latter case, he is not entitled to recover as for a total loss, unless he abandons; i. e. yield up to the insurer, within a reasonable time after he has received intelligence of the accident, all his right to the recovery of the property insured, so that the underwriter may be entitled to the benefit of what may still be of any value. "It has prevailed as a general rule," said Tindal, C. J., "and that from so early a time that it is difficult to find a case in the books in which it is not taken as an admitted principle, that in order to recover for a constructive total loss the assured must first abandon." It is an established and familiar rule of insurance law, that where the thing insured subsists in species, and there is a chance of its recovery, in order to make it a total loss there must be an abandonment. On the other hand, Mr. Justice Bayley says, "I take the legal principle to be this; if by means of any of the perils insured against, the ship ceases to retain that character and becomes a wreck, that is a total loss, and the master may sell her, and the assured may recover for a total loss without giving any notice of abandonment." "Cambridge v. Anderton, is an express decision, that when the subject matter insured has by a peril of the sea lost its form and species, where a ship, for example has become a wreck, or a mere congeries of planks, and has been *bona fide* sold in that state for a sum of money, the assured may recover a total loss without abandonment; and when such a sale is justified by necessity, the nett proceeds becomes money had and received to the use of the underwriter upon payment by him of the total loss."^a

*1167

When an abandonment is necessary to enable the insured to recover for a total loss.

It is observable, that abandonment is only necessary to render a constructive loss an actual total loss; and that it is not incumbent on the insured to abandon in such a case; he may

^a Per Tindal, C. J., in *Roux v. Salvador*, 1 Hodges, 53. 1 Bing. N. C. 536. (37 Eng. C. L. 481.)

^b Per Lord Ellenborough, C. J., in *Tuno v. Edwards*, 19 East, 491.

^c Per Bayley, J., in *Cambridge v. Anderton*, 2 B. & C. 693, (9 Eng. C. L. 994,) who cites *Read v. Bonham*, 3 B. & B. 147, (7 Eng. C. L. 384,) as an authority for this position. And see *Mullett v. Sheddin*, 13 East, 304, to the same effect.

^d Per Lord Abinger, C. B., in *Roux v. Salvador*, 3 Bing. N. C. 288. (39 Eng. C. L.)

(1) (In general where the injury is more than one-half the value, it is a technical or constructive total loss. 3 Johnson's Digest, 360. *The Patapoco Ins. Co. v. Southgate*, 5 Peters, 604. *Swall v. The U. S. Ins. Co.*, 11 Pick. 94. *Bryant v. Commonwealth Ins. Co.*, 13 Pick. 543. *Winn v. Columbian Ins. Co.*, 12 Pick. 279. *Cutlett v. Pacific Ins. Co.*, 1 Wend. 581. *Dicky v. American Ins. Co.*, 3 Wend. 658. *American Ins. Co. v. Center*, 4 Wend. 45. *Pesent v. The National Ins. Co.*, 15 Wend. 453. *Hall v. The Franklin Ins. Co.*, 9 Pick. 466.)

*run the chance of any advantage that may result to him beyond the value insured, but he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss. If in the event the loss becomes absolute, the underwriter is liable for a total loss. Where there is an abandonment, the risk is thrown on the underwriters. Where there is no abandonment, the party takes his chance of recovering according to his actual loss.⁽¹⁾ A few instances will illustrate the positions here laid down.

Where a ship was so much damaged by the perils of the sea, that in order to render her seaworthy it would cost more to repair her than she would be afterwards worth, and the captain sold her to a purchaser who partially repaired her, and sent her upon a voyage, which she never completed in consequence of her infirmity; held, that the assured were entitled to recover as for a total loss without giving notice of abandonment.^b

Where a ship loaded with saltpetre was seized at the Cape of Good Hope on her voyage to America, and the cargo condemned, unshipped, and sold by order of the Court of Admiralty there, whose sentence was afterwards reversed on appeal here, and the property ordered to be restored, or its value paid to the owner, though upon payment of the captor's costs; the court held, that the assured might recover as for a total loss, without notice of abandonment; *the thing insured* being wholly

^a 15 East, 16. 3 Bing. N. C. 287. (32 Eng. C. L.) *Davey v. Milford*, 15 East, 559.

^b *Cambridge v. Anderton*, 3 B. & C. 691. (9 Eng. C. L. 924.) 4 D. & R. 303. *Roux v. Salvador*, *ante*, 1165.

(1) (No particular form of abandonment is necessary, nor is it indispensable that it should be in writing. But in whatever form it is made, it ought to be explicit, and not left open as matter of inference from some equivocal acts. The assured must yield up to the underwriter all his right, title, and interest in the subject insured; for the abandonment, when properly made, operates as a transfer of the property to the underwriters, and gives him a title to it, or what remains of it, as far as it was covered by the policy. *The Patapoco Ins. Co. v. Southgate*, 5 Peters, 604.

The insured is not compelled in any case to abandon. He has an election which rests in his discretion; but no right to claim for a constructive or technical total loss vests, until such election is made. An election to abandon cannot be made until receipt of advice of the loss. Intelligence of the loss derived from a newspaper is sufficient; but the information must be of such facts and circumstances as would, if existing in point of fact, sustain the abandonment. A mere apprehension that a total loss may have occurred, does not authorise the offer. The mere stranding of a vessel does not, of itself, form a substantive ground of abandonment. It depends on the circumstances. *Bosley v. The Chesapeake Ins. Co.*, 3 Gill & Johns. 450.

The assured cannot abandon on the ground of imminent danger of a total loss. As if a ship, having sustained damages, is abandoned while on her way to a port to repair, the abandonment will have no effect in case she arrives and the repairs cost less than fifty per cent on her value. *Hall v. The Franklin Ins. Co.*, 9 Pick. 466.

The right to recover of the assurer for a total loss is complete, if the loss which is the basis of an abandonment, continues at the time of abandonment. *Maryland and Phoenix Ins. Cos. v. Bethant*, 5 Gill & Johns. 160. An abandonment can only operate upon the property or thing saved at the time a loss occurs; not upon that which is safe and no longer exposed to the perils insured against. An abandonment accordingly has no operation on freight earned. *Patapoco Ins. Co. v. Biscoe*, 7 Gill & Johns. 305.)

lost to the owner by the unshipping and sale of the commodity at the Cape, under the order of the court there.^a So, where a ship was so shattered in a storm, that it was found, on survey, that the expenses of repairing her would far exceed her original value, and the captain sold her *bond fide* for the benefit of all concerned; and the purchaser shortly afterwards broke her up; it was held, to be a total loss without notice of abandonment.^b

"An abandonment will not have the effect of converting a partial loss into a total loss; but if there be a total loss by one of the perils insured against, an abandonment will entitle the insured to recover as for a total loss, though the property be afterwards restored, if the insurer accede to the abandonment. But if the insurer does not act which implies an acceptance of the abandonment, and there be a restoration of the goods before the action be brought, the insured can only recover for the actual loss.^c"

*1169
Acceptance of the abandonment.

If a ship be captured, and the insured abandons before he has reason to believe that events have changed the nature of the loss, he can recover as for a total loss, though there be a subsequent restitution of the goods, if it be attended with such circumstances as to frustrate the voyage, or to render the prosecution of it a matter of doubtful policy.^d Where a vessel was placed in so much danger by the perils of the sea that the crew deserted her in order to save their lives, and the owner of the goods insured thereupon gave notice of abandonment; a few days afterwards some fishermen found the vessel, towed her into port, and repaired her; but the goods were so damaged that they were not worth the expense of forwarding them to the place of their destination; it was held, that the insured was entitled to recover as for a total loss.^e So, if the ship be prevented from proceeding, and no other ship can be found to carry the cargo to the port of destination, whereby the voyage is entirely lost, the insured may abandon.^f

^a Mullett v. Shedden, 13 East, 304, and see Goldamid v. Gillies, 4 Taunt. 803. Bondrett v. Hentigg, Holt, 149. (3 Eng. C. L. 57.)

^b Robertson v. Clark, 8 Moore, 622. 1 Bing. 445. (8 Eng. C. L. 373.) Green v. The Royal Exchange Assurance Company, 6 Taunt. 68. (1 Eng. C. L. 309.)

^c Brotherston v. Barber, 5 M. & S. 425, *post*, 1170. M'Cartney v. Abel, 5 East, 388. Hamilton v. Mendez, 2 Burr. 1198. Bainbridge v. Nelson, 10 East. 329: Where there was a loss by capture, intelligence of which was received, and an abandonment made, and a recapture took place before the notice of abandonment was given, but there was no intelligence received of such recapture until after some steps had been taken by the underwriters; held, to amount to an acceptance of the abandonment by them. Smith v. Robertson, 2 Dow. 474.

^d M'Iver v. Henderson, 4 M. & S. 576. Cologan v. London Assurance Company, 5 M. & S. 447. Falkner v. Ritchie, 2 M. & S. 290. Barker v. Blakes, 9 East, 283. Goss v. Williams, 2 Burr. 683. Hudson v. Harrison, 3 B. & B. 97. (7 Eng. C. L. 364.) 6 Moore, 298.

^e Parry v. Aberdeen, 9 B. & C. 411. (17 Eng. C. L. 408.) Holdsworth v. Wyse, 7 B. & C. 794. (14 Eng. C. L. 129.)

^f Manning v. Newnham, Park. 260. Anderson v. Royal Exchange Assurance Company, 7 East, 42.

"The barratry of the master is a ground of abandonment as for a total loss, though the goods ultimately reach their destination through the agency of strangers to the assured."^a

Notice of abandonment.

Notice of abandonment is necessary though the ship and cargo be sold and converted into money before notice of the loss had been received.^b But where, on an insurance on ship from Rio de Janeiro to Liverpool, she was captured, and afterwards recaptured; but in the interval, the assured having received intelligence of the capture, gave notice of abandonment; and after the recapture the ship arrived at Liverpool, having sustained a partial damage; held, in an action brought to recover a total loss, that the assured could only recover as for a partial loss; for the abandonment did not preclude the insured from resuming all his rights *de intègre* in the ship, as the goods were restored before action brought.^c

The insured can abandon only in case of a total loss.

*1171

4.—*When abandonment will not avail.*] The insured can not by abandonment convert a partial loss into a total loss, he can only abandon in case of a total loss; if either the ship or the voyage be lost, that is a total loss.^d Where the jury found that the damage did not exceed 48*l.* per cent., it was held not "to be such a loss as entitled the insured to abandon."^e So, it has been held, that the mere retardation of the voyage, the goods insured not being of a perishable nature or materially injured, was not a subject of abandonment.^f

The desertion of a crew does not of itself constitute a total loss, nor can the insured abandon so as to make it a total loss, unless he has exerted himself to the utmost in his power to prevent the necessity of it. Therefore, where a ship received considerable damage from tempestuous weather, and the crew, completely exhausted, deserted the ship on the high seas for the

^a Dixon v. Reid, 1 D. & R. 207. S. C. 5 B. & A. 597. (7 Eng. C. L. 201.)

^b Hodgson v. Blakiston, Park. 172.

^c Brotherton v. Barber, 5 M. & S. 418. See Underwood v. Robertson, 4 Camp. 138. An insurance was effected on goods on board a ship consigned to Buenos Ayres. The ship, with the cargo, was captured by the Brazilian government, and condemned for an attempted breach of blockade. Notice of the capture was given by the insured to the underwriters, and an offer was made by the insured to abandon. The underwriters declined the offer of abandonment; and, after some negotiation, it was arranged that, on payment by the underwriters of 35*l.* per cent. on the sum insured, the policy should be delivered up to be cancelled. The per centage was accordingly paid, and the policy cancelled. Some years afterwards, in pursuance of a convention between Great Britain and the Brazilian government, the goods were ordered by the latter government to be restored to the owners, and compensation to be made. A claim was made by the underwriters to the whole or a part of the sum awarded for compensation; but held, that the underwriters having declined the offer of abandonment, the payment of the 35*l.* per cent. was a compromise of their liability under the policy, and that they were not entitled to any portion of the sum awarded for compensation. Brooks v. MacDonnell, 1 Y. & Col. 503.

^d Per Buller, J., in Caselet v. St. Barbe, 1 T. R. 191.

^e *Id.*

^f Hunt v. The Royal Exchange Assurance Company, 5 M. & S. 47. Anderson v. Wallis, 9 M. & S. 240. Parsons v. Scott, 2 Taunt. 363.

mere preservation of their lives, and the ship was then taken possession of by a fresh crew, who succeeded in conducting her safely into port; held, that the ship having been sold under the decree of the Admiralty Court to pay the salvage, and it not appearing that the assured had taken any means to prevent such sale, that they had no right to abandon, and there was no more than a partial loss, for there was not a total loss before the sale, and the insured did not exert themselves to prevent it.^a Where freight was insured from *A.* to *B.*; the ship sailed, but was obliged to put back from stress of weather, when she was found to be incapable of complete repair, and the cargo was accordingly unloaded, and the ship sold. In an action on the policy for a total loss; held, 1st, that there was no necessity for an abandonment of the freight; and, 2dly, that the insured was bound to use all reasonable endeavors to repair the ship, so as to have carried the cargo, or part of it, which would have operated as a salvage.^b

Where the ship was wrecked, but the goods were brought on shore, though in a very damaged state, so that they became unprofitable to the assured; held, that the underwriters on the goods, who were freed by the policy from the particular average, could not be made liable as for a total loss by a notice of "abandonment." An abandonment offered to be made by the assured to the underwriter, upon intelligence brought of the capture of the goods insured, which the underwriter refused to accept, was held not to entitle the assured to recover as for a total loss, where before action brought the goods were recaptured and arrived at the place of destination, by which a partial loss only was sustained; for the assured can only recover an indemnity for such loss as he has sustained at the time of action brought.^d

*1172

If, in a case of insurance upon goods consigned to a particular port, on the arrival of the ship there, it is found to be in the hands of an enemy; that circumstance does not warrant the assured to abandon.^e

5.—*Notice of abandonment.*] In order that an abandonment may be operative, notice thereof must be given within a reasonable time.^f Notice given five days after the insured had received intelligence of the loss, was held to be too late.^g So, where a blockade of Havre (the harbor in which the ship lay) was announced in this country on the 6th of September, and notice of abandonment was given on the 14th of October; it

When notice of abandonment should be given.

^a *Thornley v. Hebson*, 2 B. & A. 513.

^b *Green v. Royal Exchange Assurance Company*, 1 Marsh. 447. 6 Taunt. 68. (1 Eng. C. L. 309.)

^c *Thompson v. Royal Exchange Assurance Company*, 16 East, 314.

^d *Patterson v. Ritchie*, 4 M. & S. 393. ^e *Lubbock v. Rowcroft*, 5 Esp. 60.

^f *Allwood v. Henckell*, Park. 290. *Mitchell v. Edie*, 1 T. R. 608.

^g *Hunt v. Royal Insurance Company*, 5 M. & S. 47.

was held to be out of time.^a So, where the vessel arrived at the port of Kinsale on the 24th of November; on the 14th of December a second survey was had, when it was found that the expenses of the repairs would exceed the value of the ship; held, that notice of abandonment to the insurers in London on the 6th of January, was too late.^b

*1173 But where the captain of a vessel, which had been damaged by stormy weather, arrived in London on the 25th of April, where his owners resided; and the latter received the ship's papers on the 3d of May following, and the broker who effected the policy gave verbal notice of abandonment to the underwriters on the 5th; held, that such notice was given in due time.^c

6.—*Effect of abandonment.*] After an abandonment has been made and the insurer has acceded to it, both parties are bound by it; the underwriters from that time stand in the place of the owner in respect of the goods.^d Underwriters who intend to resist an abandonment should do so within a reasonable time; an acquiescence for two months without rejecting the notice, has been held to amount to an acceptance of the abandonment.^e An abandonment to the underwriters on a ship, transfers freight earned subsequently to such abandonment, as incident to the ship: therefore, where there had been two separate insurances on a general seeking ship, the one on the ship, the other on freight, and the ship and freight were abandoned to the respective underwriters, each of whom paid a total loss; and the vessel was captured and recaptured, and ultimately performed her voyage, and earned freight; held, that the underwriters on the ship, under the abandonment of the ship to them, were entitled to such freight.^f

^a *Barker v. Blakes*, 9 East, 293. See *Kelly v. Walton*, 2 Camp. 155. *Anderson v. Royal Exchange Assurance Company*, 7 East, 38.

^b *Aldridge v. Bell*, 1 Stark. 498. (2 Eng. C. L. 484.)

^c *Read v. Bonham*, 6 Moore, 397. 3 B. & B. 147. (7 Eng. C. L. 384.) See *Gernon v. Royal Exchange Assurance Company*, 6 Taunt. 383. (1 Eng. C. L. 418.) 2 Marsh. 88.

^d *Smith v. Robertson*, 2 Dow. 474. *Bainbridge v. Nelson*, 10 East, 328.

^e *Hudson v. Harrison*, 3 B. & B. 97. (7 Eng. C. L. 364.) 6 Moore, 288.

^f *Davidson v. Case*, (in Error,) 5 Moore, 116. 8 Price, 542. 2 B. & B. 379. (6 Eng. C. L. 162.) 5 M. & S. 79. See *Barclay v. Sterling*, 5 M. & S. 6. *Thompson v. Rowcroft*, 4 East, 34.

SECTION X.

STRANDING.

A STRANDING takes place when the ship, being driven by the wind or sea, and taking the ground, remains stationary for some time; but the occurrence must be the result of some accidental circumstance, not necessarily incident to the ordinary course of navigation. "The general principle to be collected from the authorities, is, that where a vessel takes the ground in the ordinary and usual course of navigation and management *in a tide river and harbour, upon the ebbing of the tide, or from natural drifting of water, so that she may float again upon the flow of the tide, or increase of the water, such an event shall not be considered a stranding within the sense in the memorandum. But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event shall be considered a stranding."^a "Where," said Taunton, J., "the event happens in the ordinary course of navigation, from the regular flux and reflux of the tide, without any external force or violence, it is not a stranding; but where it arises from accident, and out of the common course, it is."^b A mere instantaneous stopping, as striking upon a rock, and remaining there for a minute and a half, does not constitute a stranding.^c But if a ship strike upon a rock and remain there twelve or fifteen minutes, it is a stranding within the meaning of the policy.^d

What constitutes a stranding.

*1174

Running on some piles four feet under water, erected in a river about nine feet from shore, for the purpose of keeping up the banks, and lying on such piles till they were cut away, was held to be a stranding.^e So where on the voyage the ship was driven by stress of weather into a harbour, at the mouth of which she struck upon an anchor, and was in danger of sinking; to prevent which, she was warped higher up in the harbour, where she took the ground, and remained fast half an hour; held, that the ship was stranded within the meaning of the policy.^f So where a ship was moored alongside a quay, in the usual place for ships of her burthen, and it became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the shore, to prevent her from falling over

^a Per Lord Tenterden, C. J., in *Wells v. Hopwood*, 3 B. & Ad. 34. (23 Eng. C. L. 18.)

^b *Id.* 22.

^c *M'Dougall v. Royal Exchange Company*, 4 M. & S. 503. 4 Camp. 283.

^d *Baker v. Towry*, 1 Stark. 436. (2 Eng. C. L. 460.)

^e *Dodson v. London Assurance Company*, Park, 77. *Kenyon, nom. Bolton v. Dobson*, Marsh. 231.

^f *Barrow v. Bell*, 7 D. & R. 244. 4 B. & C. 736. (10 Eng. C. L. 451.)

when the tide left her; and the rope, with which she was so fastened, not being of sufficient strength, broke, and the ship fell over on her side, and was thereby stove in and greatly injured; held, that this was a stranding within the meaning of that word in "the policy, and that the underwriters were liable for a partial loss, although the stranding might have been occasioned remotely by the negligence of the crew, in not providing a rope of sufficient strength to fasten the vessel to the shore."^a

*1175

Where a vessel arrived in a tide harbor, and proceeded to discharge her cargo at the side of the quay, which could be done at high water only, and could not be completed in one tide; at the first low tide she grounded on the mud, on a subsequent ebb, the rope, by which her head was moored to the opposite side, stretched, and the wind blowing from the east at the same time, she did not ground on the mud, which it was intended she should do, but her forepart got on a bank of stones and sand near to the quay, where she was stranded, and some damage done to the cargo, but none to the vessel; held, Park, J., *dissentiente*, to be a stranding.^b But where upon the ebbing of the tide in a tide harbour, the vessel took the ground in the place where it was intended she should, and in so doing struck against some hard substance, by which two holes were made in her bottom, and the cargo damaged; held, not to be a stranding.^c

We have seen that under the common memorandum the underwriter is liable for partial losses if the ship be stranded, whether it arises from the stranding, or any other peril insured against.^d To render the underwriters liable for a loss by stranding, it must take place after the adventure has commenced and before it has terminated. Therefore, where hides were insured, "free from particular average unless the ship be stranded," and in the course of a voyage the hides were so much damaged by the salt water that they were necessarily sold, after which the ship proceeded on her voyage homewards, and was stranded; it was held, that the rights of the parties were fixed and determined at the time of the sale, and that the subsequent stranding "could not affect the nature of the loss, for the policy was at an end before the stranding took place."^e

*1176

Where the policy was upon goods, "including risk of craft

^a Bishop v. Pentland, 7 B. & C. 217. (14 Eng. C. L. 33.) 1 M. & R. 49. See Rayner v. Godmond, 5 B. & A. 225. (7 Eng. C. L. 76.) Carruthers v. Sydebottom, 4 M. & S. 77. Hearn v. Edmunds, 1 B. & B. 388. (5 Eng. C. L. 129.) 4 Moore, 15.

^b Wells v. Hopwood, 3 B. & Ad. 20. (23 Eng. C. L. 18.)

^c Kingsford v. Marshal, 8 Bing. 468. (31 Eng. C. L. 344.) 1 M. & Scott, 657.

^d *Ante*, 1147. See Cantillon v. London Assurance Company, 3 Burr. 1553.

^e Roux v. Salvador, 1 Hodges, 50. 1 Bing. N. C. 526, (27 Eng. C. L. 481,) *ante*, 1167.

to and from the ship," on linseed oil cakes, "free of particular average, unless general, or the ship was stranded;" the cakes were put on board a lighter to be landed at their destination, and the lighter stranded and sank, whereby a particular average loss was sustained; held, that the underwriters were not liable; for this liability for a particular average depended upon the ship being stranded, and that event did not happen.^a

SECTION XI.

GENERAL AVERAGE.

WE have seen that it is usual to attach to policies a memorandum exempting the underwriters from liability for partial losses on certain articles therein enumerated, in these words, "warranted free from average, unless general."^b *General average* signifies the loss or damage "which is sustained by a particular part of the ship or cargo for the preservation of the rest," towards which the owners of the ship, freight, and goods, are liable, *inter se*, to contribute in proportion to their respective interests. "All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo, come within *general average*, and must be borne proportionably by all who are interested."^c To constitute a general average, the whole adventure must be put in jeopardy, and the sacrifice must be voluntary and necessary for its preservation. Where a ship in the course of her voyage was run foul of by another ship and damaged, and the captain was in consequence obliged to cut away part of the rigging, and to return to port to repair the damage and cutting away, without which the ship could not have prosecuted her voyage, or safely kept the sea; held, that the expenses of repairs, so far as they were absolutely necessary to enable the ship to prosecute the voyage, but no further, and of unloading the goods for the purpose of making the repairs, were a general average; but that the master's expenses during the unloading, repairing, and reloading and crimpage, to replace deserters during the repairs, were not a general average, as they were not necessary in order to enable the ship to prosecute the voyage. "It is immaterial," said Lord Ellenborough, "to what cause the damage was attributable, if the effect produced was to incapacitate the ship, without endangering the

What constitutes a general average.

*1177

^a Hoffman v. Marshall, 1 Hodges, 330. 2 Bing. N. C. 383. (30 Eng. C. L. 367.)

^b See *ante*, 1146.

^c Per Lawrence, J., in Birkley v. Presgrave, 1 East, 228.

whole concern, from farther prosecuting her voyage, unless she returned to port and removed the impediment; as far as removing the incapacity is concerned, all are equally benefitted by it, and therefore it seems reasonable that all should contribute towards the expenses of it; but the amount of the expenses of repairing to be placed to the account of the general contribution must be strictly confined to the necessity of the case."^a Where a ship was captured, and the captors, on occasion of a storm, threw overboard part of the ship's stores, as an act of self-preservation; this was held to be a general average, which the shipowners on recapture might enforce against the shippers of the goods.^b(1)

Partial
losses
which do
not
amount to
a general
average.

*1178

But where a ship being unable to escape from a privateer, resisted the attack, beat off the privateer, reached her port, and delivered her cargo in safety; held, that neither the expense of repairing the ship nor of curing the wounds of the sailors, nor of the ammunition, was the subject of general average.^c So where a ship, in order to escape from a privateer, carried an unusual press of sail, and succeeded in getting away, but sustained damage in so doing; this was held to "be a particular not a general average."^d So the wages and provisions of the crew while the ship remained in port, whither she was compelled to go for the safety of ship and cargo, in order to repair a damage occasioned by tempest, were held not to be the subject of general average; nor the expenses of such repair; nor the wages and provisions of the crew during her detention in port, to which she returned, and was detained there on account of adverse winds and tempest; nor the damage occasioned to the ship and tackle, by standing out to sea with a press of sail in tempestuous weather, which press of sail was necessary for that purpose, in order to avoid an impending peril of being driven on shore and stranded.^e

So where a ship laden with corn was seized by an armed mob of rioters in a time of scarcity, who took part of the corn at their own price; it was held not to be a general average, for the whole adventure was not in jeopardy, as the rioters did not intend to injure the ship or any other part of the cargo but

^a *Plummer v. Wildham*, 3 M. & S. 482. *Da Costa v. Newnham*, 2 T. R. 407. *Jackson v. Charnock*, 8 T. R. 509.

^b *Price v. Noble*, 4 Taunt. 123. An action at law may be maintained to recover a contribution in the nature of general average by one shipper of goods against another. *Dobson v. Wilson*, 3 Camp. 480. *Birkley v. Presgrave*, 1 East, 290.

^c *Taylor v. Curtis*, 2 Marsh. 309. (1 Eng. C. L. 499.) 4 Camp. 337.

^d *Covington v. Roberts*, 2 N. R. 378.

^e *Power v. Whitmore*, 4 M. & S. 141. See also *Glennie v. London Assurance Company*, 3 M. & S. 371.

(1) (If a vessel, during the prosecution of her voyage, be stranded near her port of destination, and for the purpose of relieving her, the cargo is put into lighters, and forwarded to such port, and during the passage in the lighters, a part of it sustain damage, such loss is a proper subject of general average. *Lewis v. Williams*, 1 Hall, 430.)

the corn.^a So throwing dollars overboard to prevent them from falling into the hands of the enemy, is not a general average.^b

SECTION XII.

PARTIAL LOSS.—PARTICULAR AVERAGE.

A PARTIAL loss is any loss or damage not amounting to a total loss. It is sometimes called an average loss, which is distinguished into a *general average*, which has been already considered; and a *particular average*.^c

The rule for calculating a partial loss on goods by sea damage, is to estimate the difference between the respective *gross* proceeds of the same goods when sound and when damaged, *and not the *net* proceeds; this rule being adopted chiefly to prevent the underwriter's liability from being affected by the fluctuation of the market, or by other changes after the arrival of the goods at their port of destination.^d

*1179

The rule for estimating any loss of goods insured by an open policy is to take the invoice price at the loading port, together with the premium of insurance and commission, as the basis of the calculation of the value of the goods; and the rule for estimating a partial loss in the like case, is (the same as upon a valued policy) by taking the proportional difference between the selling price of the sound, and that of the damaged part of the goods at the port of delivery, and applying that proportion (be it half, a quarter, an eighth, &c.) with reference to such estimated value at the landing port, to the damaged portion of the goods.^e Where a cargo insured by a valued policy, was confiscated and sold, but the enemy permitted the foreign consignee to retain from the proceeds the amount of his acceptances; the insured not having abandoned, the loss became partial only, and the assured was entitled to recover from the underwriter a sum bearing the same proportion to his subscription, as the loss ultimately sustained bore to the whole value in the policy.^f

The general principle that the assured shall recover no more than an indemnity in case of loss may be controlled by a mercantile usage clearly established to the contrary. Therefore

^a *Nesbitt v. Lushington*, 4 T. R. 783.

^b *Butler v. Wildman*, 3 B. & A. 404. (5 Eng. C. L. 324.)

^c *Marshall*, 486. As to what constitutes a total loss, see *ante*, 1165.

^d *Johnson v. Sheddon*, 2 East, 581. *Lewis v. Rucker*, 2 Burr. 1170. *Hurry v. Royal Exchange Assurance Company*, 3 B. & P. 308.

^e *Usher v. Noble*, 12 East, 639.

^f *Goldsmid v. Gillies*, 4 Taunt. 803.

an usage, that the loss in an open policy on freight shall be adjusted on the gross, and not on the net amount of the freight, is a legal usage.^a A loss by general average is to be calculated according to the law of the port of discharge. Therefore, an action will not lie in this country to recover back money paid upon an average loss adjusted at St. Petersburg, according to the law of Russia, (the consignor and consignee of the goods, and the owner of the vessel being British subjects,) although

*1180 "by the law of England an average loss would not be payable under the circumstances."^b

The liability of the underwriter is not restricted to the single amount of his subscription, but he may be subject either to several average losses, or to an average loss and total loss, or to money expended and labor bestowed about the defence, safeguard and recovery of the ship, to a much greater amount than the subscription; and it shall be recoverable as an average loss.^c Where a ship is seized and condemned by a foreign state, and purchased by the master on behalf of his owner, the owner can only recover as for a partial loss; for the property in the ship is not divested out of him.^d

On a policy *on freight*, the ship having actually earned full freight, though not that intended for her, the owners cannot recover for the delay and expense as a partial loss.^e

When a ship, partially damaged, has been repaired by the owners, the insurers are only liable to two thirds of the repair, in consideration of the benefit which the owners derive from the new materials instead of the old.^f(1) But the underwriters are not entitled to the usual deduction of one third where the ship has been repaired, unless she has been restored to the free possession of the owner.^g

^a *Palmer v. Blackburn*, 1 Bing. 61. (8 Eng. C. L. 249.)

^b *Simonds v. White*, 4 D. & R. 375. 9 B. & C. 805. (9 Eng. C. L. 251.)

^c *Le Cheminant v. Pearson*, and *Same v. Allnutt*, 4 Taunt. 367.

^d *Wilson v. Foster*, 1 Marsh. 425. 6 Taunt. 25. (1 Eng. C. L. 296.)

^e *Brocklebank v. Sugrue*, 1 M. & Rob. 102.

^f *Poingdestre v. Royal Exchange Assurance Company*, R. & M. 378. (31 Eng. C. L. 463.)

^g *Da Costa v. Newnam*, 2 T. R. 407.

(1) (In adjusting a partial loss on a ship which has been repaired, the proceeds of the old materials not used in the repairs are first to be deducted from the gross expenses of the repairs, and then the deduction of one third new for old is to be made from the balance. A usage at a particular place to make the deduction of one-third new for old from the gross amount of the expenses of repairs cannot control this general principle of law, in the construction of a policy containing no reference to such usage. Such usage, moreover, is unreasonable, because opposed to the essence of the contract of insurance, which is a contract of indemnity. *Eager v. The Atlas Ins. Co.*, 14 Pick. 141.)

SECTION XIII.

ADJUSTMENT.

WHEN a loss is settled, and the amount of indemnity which the insured, after all proper allowances and deductions have been made, is entitled to receive, indorsed on the policy, and signed by the underwriter or his agent, it is termed an adjustment and is *prima facie* but not conclusive evidence of the liability of the insurer to pay that amount.^a "An adjustment," said Lord Ellenborough, "is an admission upon a supposition of the truth of certain facts stated, that the insured is entitled to recover on the policy; and an underwriter must make a strong case after admitting his liability; but until he has paid the money, he is at liberty to avail himself of any defence which the facts, or the law of the case will furnish."^b *1181

Where a ship was insured, warranted free from capture in port, and a letter announcing her capture stated it to be in port, on which the underwriter and assured adjusted, the former returning, and the latter receiving back the premium. It having afterwards appeared that the capture was not in port; held, that the assured was not precluded by the adjustment and repayment from recovering on the policy, whether the underwriter's name had been struck off the adjustment only, or of the policy also.^c

SECTION XIV.

WARRANTIES.

	PAGE		PAGE
1. What constitutes a warranty.		3. Time of sailing.	1183
2. Safety of the ship on a given day	1183	4. Departing with convoy.	1186
		5. Neutrality.	1187

1.—*What constitutes a warranty.*] A WARRANTY is an undertaking on the part of the insured in nature of a condition precedent, and is either express or implied; an *express* warranty is a stipulation in print or writing inserted in, or by reference incorporated with, the policy; as that the thing insured

^a Herbert v. Champion, 1 Camp. 134.

^b Per Lord Ellenborough, C. J., *id.* See also Shepherd v. Chewter, 1 Camp. 274. Yoller v. Griffiths, S. N. P. 972. De Garron v. Galbraith, Park. 194. Jell v. Pratt, 2 Stark. 67. (3 Eng. C. L. 247.) Steel v. Lacey, 3 Taunt. 265.

^c Reyner v. Hall, 4 Taunt. 725.

is neutral property, that the ship was safe at a particular time, or the like; an *implied warranty* * is that which by implication of law is annexed to every policy without any express stipulation, as that the ship shall be sea-worthy when she sails, that she shall be navigated with reasonable skill and care. No particular form of expression is necessary to constitute a warranty; "any positive averment or allegation on the face of the instrument, and making part of the written contract, whether inserted in the body of it or written in the margin, amounts to a warranty."^a Thus, the words, "warranted well on a particular day," written at the foot of the policy, were held, to amount to a warranty that the ship was in safety on that day.^b So, where the words "thirty seamen besides passengers," were written in the margin; it was held to amount to a warranty, that there were thirty persons belonging to the ship's company.^c A policy on goods "of and in the ship called the Catherine, an American vessel," amounts to a warranty that the ship is American.^d

What constitutes a warranty.

But to constitute a warranty, it must clearly appear from the agreement that the parties intended that it should operate as a warranty. Where the policy was on goods on board the ship "called the *American ship, President*;" it was held, not to be a warranty of her being an American ship, but that the whole was considered as her name.^e An insurance on "the cargo," being 1031 hogsheads of wine, does not amount to a warranty that the wine constitutes the whole cargo, and that no other goods shall be taken on board.^f

A warranty does not include any thing not necessarily implied in it; therefore, a warranty that a ship should have twenty guns, was held not to mean also that she should have the necessary complement of men to work all the guns.^g If a stipulation be written on a separate paper, though pinned or wafered to the policy, it is not a warranty, but only a representation.^h

*1183 "A warranty must be strictly complied with; a substantial performance is not sufficient. "If," said Le Blanc, J., "the stipulation be not strictly true, the assured cannot recover on the policy to whatever cause the loss be owing, whether the loss be connected with the subject of such warranty, or wholly independent of it; for it is a condition on which the contract is to take effect, which failing, the contract fails."ⁱ

^a Per Le Blanc, J., in *Lothian v. Henderson*, 3 B. & P. 515.

^b *Blackhurst v. Cockell*, 3 T. R. 360.

^c *Bean v. Rupert*, Doug. 10. ^d *Lothian v. Henderson*, *supra*.

^e *Le Mesurier v. Vaughan*, 6 East, 382. *Hall v. Molineux*, *id.* 385, *n.* *Clapham v. Cologan*, 3 Camp. 389.

^f *Muller v. Thompson*, 2 Camp. 610. ^g *Hyde v. Bruce*, Marsh. 364.

^h *Pawson v. Barnevelt*, Doug. 12, *n.* *Bird v. Fletcher*, Doug. 13.

ⁱ Per Le Blanc, J., in *Lothian v. Henderson*, 3 B. & P. 515. *De Hahn v. Hartley*, 1 T. R. 345. *Woolmer v. Mulleman*, 1 Bl. 437. 3 Burr. 1419. *Pawson v. Watson*, Cowp. 785. In an action on a policy on a ship; held, that where the assured had

2.—*Safety of the ship on a given day.*] A warranty that the ship or goods were safe on a particular day, is satisfied if they were safe at any time on that day, though it turn out that they were lost on that day, before the policy was underwritten.^a A policy on a ship at and from *H.* to *V.* contained a warranty that she was “in port” on a previous day; held, to mean the port of *H.*, and that the warranty was not satisfied by showing that she was in some other port on that day.^b

3.—*Time of sailing.*] A warranty to sail on or before a particular day, is not satisfied if the ship does not completely unmoor on that day, though she then has her cargo and passengers on board, and is merely prevented from sailing by stress of weather,^c or by an embargo.^d So, where a ship in complete sea-readiness weighed anchor with some little prospect of more favorable weather, but in half an hour was beaten back, and came to anchor within the bar, half a mile nearer to the sea than the place of loading; held, that this was not a departure within the warranty.^e

But where on a warranty to sail from Jamaica, on or before a day certain, the ship departed from her port on that day, with all her cargo and clearances on board, and proceeded to the place of rendezvous in the island expecting to find convoy and proceed immediately, but was detained there by an embargo till after the day; it was held, that the departure was a compliance with the warranty, although the captain knew of the embargo when he sailed, the embargo being only till convoy should be ready.^f

*1184
Warranty
as to time
of sailing.

Where a policy contained a warranty “not to sail for *B.* after the 15th of August;” on the morning of that day the vessel was cleared at the custom-house of *D.*, and ready for sea. On the same day she was warped down the river for the purpose of proceeding on her voyage to *B.*; the master and crew knew at the same time that it was impossible to get to sea that day; on the next day she was warped a little further, and on the 17th, the wind having changed, she got to sea; the jury having found that the master and crew intended to have sailed on the 15th, and did all in their power to effect that object; it was held, that the warranty not to sail for *B.* after the 15th, had been complied with.^g

once provided a sufficient crew, the negligent absence of all the crew at the time of the loss, was no breach of the implied warranty, that the ship should be properly manned. *Busk v. Royal Exchange Assurance Company*, 2 B. & A. 73.

^a *Blackhurst v. Cockell*, 9 T. R. 360.

^b *Colby v. Hunter*, 3 C. & P. 7. (14 Eng. C. L. 183.) M. & M. 81.

^c *Nelson v. Salvador*, M. & M. 309. (23 Eng. C. L. 317.)

^d *Hore v. Whitmore*, Cowp. 784.

^e *Moir v. Royal Exchange Assurance Company*, 6 Taunt. 241. (1 Eng. C. L. 572.)

1 Marsh. 570. 3 M. & S. 461. 4 Camp. 84.

^f *Earle v. Harris*, Dougl. 357. *Bond v. Nutt*, *Id.* 367. Cowp. 607. *Wright v. Shiffner*, 11 East, 615. *Thellason v. Ferguson*, Dougl. 361.

^g *Cochrane v. Fisher*, in Error, 1 C. M. & R. 809. Affirming S. C. 2 C. & M. 581.

The ship should sail and be equipped for her voyage at the appointed time.

When a ship was warranted to sail on or before a particular day, she should not only set sail by the appointed time, but also be completely equipped for the voyage. The general principle of the decisions is, that if a ship quits her moorings and removes, though only to a short distance, being perfectly ready to proceed on her voyage, and is by some subsequent occurrence detained, that is nevertheless a sailing; but it is otherwise if, at the time when she quits her moorings and hoists her sails, she is not in a condition for completing her sea voyage.^a A policy of assurance on freight and goods, per ship named, at and from Portneuf to London, warranted to sail on or before the 28th of October, and on the 26th the ship dropped down from Portneuf with an incomplete crew for the voyage, and on the 29th reached Quebec, which was the nearest place where she *could obtain a clearance, and there completed her crew, and on the 29th obtained her clearance, and sailed the next day; held, that the dropping down from Portneuf to Quebec, on the 26th, was not a compliance with the warranty.^b

*1185

So, where it was provided by certain regulations, that vessels should not sail from ports in Ireland after the 1st of September, and that the time of clearing at the custom-house should be deemed the time of sailing, "*provided the ship were then ready for sea*;" and a ship subject to these regulations dropped down the river before the 1st of September in readiness for sea, except that she had not a full quantity of ballast, there being a bar at the mouth of the river which the ship could not have crossed with that quantity; boats were waiting outside on the 1st of September to ship the remainder of the ballast, and the vessel crossed the bar on that day, but struck in so doing, in consequence of which the rest of the ballast was not taken in before the 4th of September; held, that the warranty was not complied with, for she was not in a condition to sail on the 1st, not having sufficient ballast to enable her to effect the voyage.^c So, where the vessel left the harbor on the particular day, without having a sufficient crew on board, although the remainder of the crew were engaged and ready to sail; it was held, on the authority of the preceding case, that she was not ready to sail within the terms of the warranty.^d

But where a policy on goods by ship or ships, from Demerara to London, warranted to sail from Demerara on or before the 1st of August; and the usage was for small vessels to load and unload all their cargo in the river of Demerara, and for large vessels to load and unload part of their cargo on the outside of a shoal of Demerara, about ten miles at sea. The insured goods were loaded on board a small vessel, which com-

^a Per Lord Tenterden, C. J., in *Pittegrew v. Pringle*, 3 B. & Ad. 590. (33 Eng. C. L. 136.)

^b *Ridsdale v. Newnham*, 3 M. & S. 456. 4 Camp. 111.

^c *Pittegrew v. Pringle*, *supra*.

^d *Graham v. Barras*, 5 B. & Ad. 1011. (37 Eng. C. L. 954.) 3 N. & M. 195.

pleted her cargo in the river, the captain of which, having obtained his clearance, set sail on the 1st of August, proceeded down the river, and about two miles out at sea, and there anchored, at low water, by the advice of his pilot. On the 3d of August *he crossed the shoal and proceeded on his voyage, in the course of which the vessel was lost by perils of the sea; held, that the vessel sailed from Demerara on the 1st of August, within the meaning and in satisfaction of the terms of the policy.^a

*1186

A warranty to sail *after* a certain day, is broken by sailing before that day.^b

4.—*Departing with convoy.*] In time of war, a warranty to sail or depart with a convoy is usually inserted in policies; and if a ship so warranted sail without a convoy, the insurer will not be liable on the policy even though the ship be lost by the perils of the sea, and though the non-compliance with the warranty be attributable to the refusal of the government to appoint a convoy.^c

If a ship does not sail with the convoy appointed by government, it is not a sailing with convoy within the terms of the warranty. The protection of a ship of war accidentally bound on the same voyage, although discharging the office of convoy, is not sufficient, but a convoy appointed by the admiral commanding in chief upon a foreign station, will be considered as a convoy appointed by government.^d

A warranty to depart with convoy is not complied with unless sailing instructions be obtained before the ship leaves the place of rendezvous, if by due diligence of the master, they can be obtained.^e But if the master do all in his power to obtain sailing instructions, it is a sufficient compliance with the warranty, though he do not obtain them.^f

Where there are no convoys appointed at the port from which a ship commences her homeward voyage, she is not bound to call for convoy at a port, in the course of the voyage, from which convoys are appointed.^g A ship warranted to depart with convoy, must not only depart, but continue until the end of the *voyage with such convoy, unless prevented by absolute necessity; therefore, where a ship so circumstanced did depart, but being driven back by a storm, put into and refitted at an English port, from whence convoy usually sailed, and again sailed without convoy; held, that the warranty was not complied with, and that the loss was not within the policy.^h

*1187

^a Lang v. Anderton, 5 D. & R. 493. 3 B. & C. 495. (10 Eng. C. L. 163.)

^b Vezian v. Grant, Park, 495.

^c Marshall, 359.

^d Hibbert v. Pigeon, Park, 499. Smith v. Readshaw, *Id.* 510.

^e Anderson v. Pitcher, 2 B. & P. 164. Webb v. Thompson, 1 B. & P. 5.

^f Veodon v. Wilmot, Abb. Ship, 243.

^g Park v. Hammond, 2 Marsh. 119. 6 Taunt. 495. (1 Eng. C. L. 464.)

^h Morrice v. Dillon, Selw. N. P. 992.

Where a ship got under way with the convoy, but waited some time for the master to come on board, whereby she lost her position in the convoy; held, that there was a breach of the warranty, and that the underwriters were discharged.^a

By 43 Geo. III, c. 57, which continued in force during hostilities with France, it was rendered highly penal for any ship belonging to his majesty's subjects (with a few exceptions) to sail without a convoy.

5.—*Neutrality.*] In time of war, if the insured be a subject of a neutral state, it is usual that he should warrant the ship or goods to be neutral property, which implies that it belongs to the subject of a state in amity with the belligerent powers, and therefore not liable to capture. By a warranty of neutrality is to be understood that the property was neutral when the risk commenced, not that it should continue so during the voyage, the chance of future war being always a risk within the policy.^b But any forfeiture of neutrality by the wilful act of the insured, or of the master or crew, after the commencement of the voyage, is a breach of the warranty.^c

A compliance with a warranty of neutrality requires that the vessel insured should belong to the subject of a neutral state, that it should be navigated according to the law of nations, and in conformity with the particular treaties subsisting between the country to which she belongs, and the belligerent states, and that she be properly documented.

*1188 A warranty of national character is not satisfied by the owner being a native of the country stated in the warranty, if he reside and carry on trade in the states of a foreign belligerent power, for he is considered as adhering to the enemy.^d Where a ship, warranted American, had not on board a passport, which was required by the treaty between France and America; it was held, that the assured could not recover, inasmuch as the warranty had not been complied with; for that required that the ship should be entitled to all the privileges of the American flag, and in order to be entitled to these privileges, she should have had a passport.^e

The warranty obliges the insured to have only such documents as are binding on the neutral country; it does not impose on him the necessity of complying with the peculiar laws and regulations of the belligerent powers.^f

If the ship be captured, and at the time of the capture her papers are thrown overboard, it affords a presumption that she

^a Waltham v. Thompson, Marsh. Ins. 381.

^b Marsh. 387. Eden v. Parkinson, Doug. 732. Tyson v. Gurney, 3 T. R. 477.

^c Garrels v. Kensington, 8 T. R. 230.

^d Tabbs v. Bandelack, 3 B. & P. 207. 4 Esp. 108.

^e Rich v. Parker, 7 T. R. 705. Baring v. Christie, 5 East, 398.

^f Pollard v. Bell, 8 T. R. 434. Bird v. Appleton, *Id.* 562. Siffken v. Lee, 2 N. R. 484. Price v. Bell, 1 East, 663.

was not neutral.^a But the most usual evidence adduced to show a non-compliance with the warranty is the sentence of a court of admiralty, or other court having jurisdiction in questions of prize, by which the ship or goods warranted have been condemned as prize. Such sentences are conclusive as to all matters upon which the courts of admiralty adjudicate, being within their jurisdiction.^b If it be a general sentence of condemnation, without assigning any reason, it will be considered as having proceeded on the ground that the property belonged to the enemy and was not neutral;^c but if a special cause of condemnation be stated, and it be doubtful whether it proceeded on the ground that it was the enemy's property, it is not conclusive.^d

*SECTION XV.

*1189

SEAWORTHINESS.

EVERY policy, whether on ship or goods, contains an implied warranty that the ship shall be seaworthy when she sails, that is, that she shall be tight, staunch and strong, properly manned provided with all necessary stores, and in all respects fit for the intended voyage, and navigated with reasonable skill and according to law.^e If a ship be seaworthy at the time that she sails on her voyage, it is sufficient; it is not necessary that she should be seaworthy from the moment when the policy attaches, or the risk commences.^f(1) On a policy "at and from" the port at which the ship was undergoing repairs at the time of insurance; it was held, that though she was not then seaworthy for the intended voyage, she was sufficiently so in the harbor.^g(2)

^a Per Buller, J., in *Bernardi v. Motteux*, Doug. 575.

^b *Bernardi v. Motteux*, Doug. 575. *Geyer v. Aguilar*, 7 T. R. 681.

^c *Saloneci v. Woodman*, Park, 528. 2 Stark. Ev. 653. *Bolton v. Gladstone*, 5 East, 155. *Lothian v. Henderson*, 3 B. & P. 499.

^d *Bernardi v. Motteux*, Doug. 575.

^e Marsh. 153. As sea-worthiness is a condition or implied warranty in every policy, there need be no representation made at the time of her condition, for if she sails without being so, there is no valid policy. *Shoolbred v. Nutt*, Park, 346. *Hayward v. Rogers*, 1 East, 590.

^f *Forbes v. Wilson*, *Id.* 155.

^g *Forbes v. Wilson*, Park, 344. *Annen v. Woodman*, 3 Taunt. 299.

(1) (The want of seaworthiness in a vessel, at the commencement of the voyage, will be a sufficient defence to the insurers on the vessel, although she arrived in safety at her port of destination. *Prescott v. The Union Ins. Co.*, 1 Wharton, 399.)

(2) (In the case of insurance on cargo and freight, at and from a foreign port, the policy will attach, notwithstanding the vessel, while in port with the cargo on board, may need repairs to put her in a fit condition to undertake the voyage; the implied warranty being that she shall be seaworthy, not at the time of having the cargo on board, but at the time of her sailing. *The Merchants' Ins. Co. v. Clapp*, 11 Pick. 56.)

What constitutes seaworthiness.

To satisfy a warranty of seaworthiness, it is necessary not only that the hull of the vessel be tight, staunch and strong, but that she be also furnished with ground-tackling sufficient to encounter the ordinary perils of the sea; and therefore, where it appeared that the best bower-anchor and the cable of the small bower-anchor were defective, the vessel was held not to be seaworthy.^a Where a vessel had been lengthened and insured for a foreign voyage, but the new parts were not fastened with hanging knees; held, that she was not seaworthy for such a voyage, at the commencement of the risk.^b A ship to be seaworthy must be rendered as secure as possible from capture, as well as as from the perils of the sea.^c A neutral vessel is not seaworthy, unless she is provided with documents to prove her neutrality.^d

*1190
If the ship be seaworthy at the commencement of the risk, it is sufficient.

*It is a clear and established principle, that if a ship is seaworthy at the commencement of the risk, though she becomes otherwise in one hour afterwards, the warranty is complied with, and the underwriter is liable.^e(1) But where the inability of a ship to perform the voyage insured, appears in a short time from the period of her setting sail, the presumption is, that the inability arose from causes existing previously to the commencement of the voyage, and that she was not then seaworthy.(2) Therefore, where a ship sailed on her voyage, and a few days afterwards without any adequate cause arising after the period of her sailing, became so leaky as to compel the master to return to Honduras; on returning thither, she struck on a reef of rocks, and was lost; held, that she was not seaworthy at the time of commencement of the risk.^f So, where a ship sailed, and soon afterwards encountered a storm, became leaky, put back, and was found on survey to be materially decayed, and a damage was discovered which could not fairly be considered as the effect of a storm; held, that she was not seaworthy when she sailed on the voyage insured; and that on a question as to seaworthiness, honesty of intention is no answer, but the fact of seaworthiness must appear, or otherwise the underwriter is discharged; and though a vessel, after sailing encounters a storm, yet, unless the damage which renders her

^a Wilkie v. Geddes, 3 Dow. 57.

^b Watt v. Morris, 1 Dow. 32.

^c Wedderburn v. Bell, 1 Camp. 1.

^d Steel v. Lacy, 3 Taunt. 285.

^e Watson v. Clark, 1 Dow. 336. 344. 348.

^f Munro v. Vandam, Park, 333.

(1) (*American Ins. Co. v. Ogden*, 15 Wend. 532.)

(2) (Where the question was as to the seaworthiness of a vessel, in an action by the insured against the insurer, and there being no contradictory testimony as to the facts, the judge charged the jury that "if the facts are as stated in the protest, that the vessel began to leak as soon as she began to sail or soon after, and continued to leak up to the time of the storm, or any fortuitous accident, and would in consequence thereof have required repairs, although there had been no storm, then the law says she was unseaworthy," it was held that the law was correctly laid down to the jury, and that the court was right in not leaving it to the jury to presume seaworthiness or otherwise. *Prescott v. The Union Ins. Co.*, 1 Wharton, 399. See *Peddock v. The Franklin Ins. Co.*, 11 Pick. 227.)

unfit for the voyage can be fairly considered as the effect of such storm, the implied warranty is not complied with.^a

An implied warranty of seaworthiness requires that the ship should be provided with a sufficient crew, of competent skill, a captain, and a pilot, when necessary.^b The underwriters were held not to be liable, where the crew were insufficient, in not having a person on board able to take the captain's place on his being dangerously ill, and the ship was consequently obliged to deviate from her course to find a person to direct her.^c

The ship must be provided with a competent crew, and a person qualified to navigate her.
*1191

When a ship homeward bound to the port of London, received a pilot at *Orfordness*, as directed by 5 Geo. II, c. 20, and dropped him before she reached her moorings in the river Thames, after which she was sunk by an accident; it was held that the underwriters were discharged from liability; Lord Kenyon, C. J., observing, that "in this case the captain did not perform his duty, for he had no pilot on board at the time when the accident happened; and it is one of the things implied in contracts of this kind, that there shall be some person on board the ship apparently qualified to navigate her."^d

If the owner in the first instance provides the ship with a competent crew, the implied warranty is complied with, though the ship be lost through the negligence of the crew.^e The owner having provided a competent master and crew in the first instance has discharged his duty, and is not responsible for their negligence as between him and the underwriters.^f The implied warranty of seaworthiness, in a policy on a ship does not extend to her being seaworthy at every port which she leaves in the course of her voyage.^g Where a vessel engaged in the southern whale and seal fishery, and with liberty to chase and capture prizes, is insured in August, 1807, with a retrospect to the first of August, 1806, although at the time of her insurance she was not competent to pursue all the purposes of her voyage, her crew being reduced by death and

If a competent crew be provided in the first instance, it is sufficient.

^a *Douglas v. Scougall*, 4 Dow. 269. *Parkes v. Potts*, 3 Dow. 23. *Beach v. Cawley*, Park, 343.

^b *Tait v. Levi*, 14 East, 481. *Forshaw v. Chabert*, 3 B. & B. 158. (7 Eng. C. L. 389.) 6 Moore, 369. "The vessel must not only be seaworthy, but the crew must be adequate to discharge the ordinary duties, and to meet the usual dangers to which she is exposed." Per Lord Ellenborough, C. J., in *Hunter v. Potts*, S. N. P. 1011.

^c *Clifford v. Hunter*, M. & M. 103. 3 C. & P. 16. (14 Eng. C. L. 189.) But it was considered to be a question of fact for the jury, and not a question of law to be determined by the judge, whether the not having a sufficient person to manage the ship when the captain was ill, amounted to a breach of the warranty. *Id.*

^d *Law v. Hollingsworth*, 7 T. R. 160. It was mooted in this case, but the court refrained from expressing their opinion, whether it is essentially necessary, to the right of the assured to recover, that in navigating up the Thames, there should be a pilot on board qualified according to the directions of the statute.

^e *Busk v. Royal Exchange Assurance Company*, 2 B. & A. 73.

^f *Per Bayley, J.*, in *Walker v. Maitland*, 5 B. & A. 173. (7 Eng. C. L. 59.) *Shore v. Bentall*, 7 B. & C. 798, n. (14 Eng. C. L. 130.) *Bishop v. Pentland*, *Id.* 219. (14 Eng. C. L. 33.)

^g *Holdsworth v. Wise*, 1 M. & R. 673. 7 B. & C. 794. (14 Eng. C. L. 139.)

*1193 casualities; if she had a competent force to pursue *any* part of *her adventure, and could be safely navigated home, she is to be deemed seaworthy.^a

If a vessel at the outset of her voyage be by mistake or accident unseaworthy, owing to some defect which is remedied before any loss happens in consequence of it, the policy will not, on that account, be void. Therefore where a ship insured at and from a port, sailed on her voyage in an unseaworthy state, in consequence of having a greater cargo than she could safely carry, and the defect was discovered before any loss accrued, and part of the cargo was discharged, and a loss subsequently accrued, in no degree attributable to her having been overladen in the early part of her voyage; held, that the underwriters were liable for such loss.^b

In a policy by a member of a mutual insurance club, there was a memorandum, amongst other exceptions, warranties, rules, terms, conditions, and agreements, that "all ships were to be inspected and approved by a committee of the club, and that all chain cables were to be properly tested;" held, in an action for a loss, that it was not a condition precedent which made it necessary for the insured to prove that a chain cable had been tested previously to the voyage.^c

SECTION XVI.

DEVIATION.

A deviation from the usual course of the voyage, without necessity, will vitiate the policy.

*1193

By deviation is meant a departure, without necessity or justifiable cause, from the usual course of the voyage insured. By the terms of the contract, the insurer only runs the risk of the voyage agreed upon, and of no other; it is therefore a condition necessarily implied in the policy, that the ship shall proceed to her port of destination, by the shortest and safest course. If the insured deviated without necessity or a justifiable cause, it is a breach of the implied warranty, the effect *of which is not to avoid the policy, but to discharge the underwriter from all subsequent responsibility.^d As if a ship or goods be damaged before deviation, and be lost after deviation the insurer is not answerable for the loss, but he is responsible for the damage sustained previous to the deviation.^e The

^a *Hucks v. Thornton*, Holt, 30. (3 Eng. C. L. 13.)

^b *Weir v. Aberdeen*, 2 B. & A. 320.

^c *Harrison v. Douglas*, 5 Nev. & M. 180. 3 Adol. & Ellis, 396. (30 Eng. C. L. 195.) 1 Harr. & Woll. 380. Payment of money into court in an action on a policy admits that the ship was seaworthy. *Id.*

^d *Green v. Young*, 2 Lord Raym. 842.

^e *Marsh*. 184. *Davis v. Garrett*, 6 Bing. 716. (19 Eng. C. L. 212.) 4 M. & P.

reason why a deviation discharges the underwriter is, not that the risk is thereby increased, but because the insured has without necessity substituted another voyage for that which was insured, and thereby varied the risk.^a The shortness of the time or of the distance makes no difference as to its effect on the contract; whether it be for a month, or for one mile, or for one hundred, the consequence is the same.^b

Where goods were insured from Dunkirk to Leghorn and the ship came to Dover, in her way to procure a Mediterranean pass, it was held to be a deviation.^c

If a ship insured for one voyage sails upon another, though she be taken before the dividing point of the two voyages, it is a deviation which discharges the insurer.^d But if the ship sails on the intended voyage, and a deviation is *afterwards* intended, which is not carried into effect, it will not avoid the policy.^e “Where the insurance is on a voyage to a given place, and the captain when he sails does not mean to go to that place at all, he never sails on the voyage insured. But where the ultimate *termini* of the intended voyages are the same as those described in the policy, although an intermediate voyage be contemplated, the voyage is to be considered the same until the vessel arrives at the dividing point of the two voyages. The departure from the course of the voyage insured then becomes a deviation; but before the arrival at the dividing point, there is no more than an intention to deviate, which, if not carried into effect, will not vitiate the policy.^f Where a *policy was effected on goods from Liverpool to London, and the captain took in goods at Liverpool for Southampton as well as for London, intending to go first to Southampton, the *termini* of the voyage being the same as those described in the policy; it was held, to be the same voyage until the vessel reached the dividing point; and that the policy attached so far, though putting into Southampton was a deviation.^g

What constitutes a deviation.

*1194

If where there are several courses or modes of performing a voyage, the master select a particular track for a purpose foreign to the voyage, instead of adopting that which is the safest, considered merely with reference to the voyage insured, it is a deviation which will avoid the policy.^h

A clause is frequently introduced into policies giving liberty to the insured to touch, stay, trade, &c., at any port or places; Liberty to touch, stay, &c.

^a Per Lord Mansfield, C. J., in *Lavatre v. Wilson*, Doug. 291. *Hare v. Travis*, 7 B. & C. 14, (14 Eng. C. L. 4.) *post*.

^b *Id.*

^c *Townson v. Guyon*, Marsh. 186.

^d *Wooldridge v. Boydell*, Doug. 16.

^e *Foster v. Wilmer*, 2 Stra. 1249. *Thelluson v. Fergusson*, Doug. 361. *Kewley v. Ryan*, 1 H. Bl. 343.

^f Per Bayley, J., in *Hare v. Travis*, 7 B. & C. 17. (14 Eng. C. L. 4.)

^g *Id.* When the vessel arrived at London the goods insured were found damaged; it was held, that the evidence was properly left to the jury, to say whether the goods were damaged previous to the ship deviating from the direct course. *Id.*

^h *Middlewood v. Blakes*, 7 T. R. 162.

a liberty to touch "at any port or place whatsoever, for all purposes," must be taken to mean for some purpose connected with the voyage; therefore, if the insured touch at any port or place, for a purpose unconnected with the object of the voyage, it will avoid the policy.^a

At and
from.

Where a vessel insured on freight at and from London to Grenada arrived in safety, and proceeded to deliver her outward cargo in different bays of the island, (when there was but one custom-house,) and was lost in entering a bay to which she was going, for the double purpose of delivering the remainder of her outward, and taking in a homeward cargo; held, that this was not a deviation, and that the underwriters were liable for the loss of the homeward freight; for the employment in which the ship was engaged at the time of the loss was necessarily connected with the homeward voyage.^b But where a vessel was insured "at and from her port of loading in North America, to her port of discharge in England," and she took in part of her cargo at Cockaigne, in New Brunswick, and then

*1195

"sailed further up to Bucktush, a place within seven miles of Cockaigne, higher up in the same bay, and within the general jurisdiction of the same custom-house at St. John's, but having a custom-house officer, equally with Cockaigne, entitled to grant clearances. At Bucktush she took in a further part of her cargo, and returning to Cockaigne, there completed her cargo; held, in an action for a loss which occurred after the vessel had sailed on her voyage, that the going to Bucktush after she had commenced taking in her cargo, was a deviation which vitiated the policy; for the expression, "from her port of loading," meant one single place; therefore, when the ship once began loading at Cockaigne, it ought to have finished there; going to any other place was a deviation."^c

Port of
loading
means one
single
place.
Of the or-
der in
which
ports must
be touched
at.

Under a policy from London to the ship's discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders, or any other purpose; the ship in touching for orders before she has selected her port of discharge, is not confined to take the ports in the successive order in which they lie in the course of the voyage, but may return to a port she has quitted, for orders as to her port of discharge.^d But after she has selected her port of discharge, she must touch at ports only in their successive order.^e If ports of call are named in a policy in a successive order, the ship must take them in the same succession in which they are named.

^a Rucker v. Allnutt, 15 East, 278. Langhorn v. Allnutt, 4 Taunt. 519. Hammond v. Reid, 4 B. & A. 73. (6 Eng. C. L. 354.) Solly v. Whitmore, 5 B. & A. 46. (7 Eng. C. L. 17.)

^b Warre v. Miller, 7 D. & R. 1. 4 B. & C. 538. (10 Eng. C. L. 405.)

^c Brown v. Tayleure, 1 Harr. & Woll. 578. 5 N. & M. 473.

^d Andrews v. Mellish, (in Error,) 5 Taunt. 496. (1 Eng. C. L. 170.) 2 M. & S. 27. 16 East, 312.

^e See Hunter v. Leathly, 10 B. & C. 858, (31 Eng. C. L. 184,) (in Error.) 7 Bing. 517. (20 Eng. C. L. 221.) 1 C. & J. 423. Driscoll v. Bovil, 1 B. & P. 316.

Upon a policy from London to Trinidad, or the Spanish Main, with liberty to call at all or any of the West India islands or settlements, and with liberty to touch and stay at any ports or places whatsoever and wheresoever, the assured must take all the ports at which he touches, in the same succession in which they occur in the course of the voyage insured. But if he is lost in steering for an island not in the outward course of his voyage to Trinidad, it is a question for the jury to consider, whether he had not abandoned the intention of going to Trinidad, and restricted himself to the residue of the voyage *only.* Where a ship insured at and from Lisbon, had liberty to call at any one port in Portugal for any purpose whatsoever, and after leaving Lisbon sailed to complete her cargo to Faro, a port to the southward; held, that the permission must be restrained to the northward ports on her way to England, and that she had deviated by going southward.^b *1196

Where a ship was insured from London to Berbice, with an extensive liberty of touching and trading at all places; held, that by putting into Madeira, and staying there after the convoy with which she sailed had proceeded on the voyage, she was guilty of a deviation, which discharged the underwriters.^c

Policy on a ship "from London to New South Wales, and from thence to all parts and places in the East Indies, or South America, with liberty to take in and land goods and passengers, and to trade backwards and forwards and forwards and backwards;" held, that after the arrival of the ship at New South Wales, she was protected by the policy so long only as she was sailing on a voyage either to South America or to the East Indies, or on some intermediate voyage, having for its ultimate object the accomplishment of a voyage either to South America or to the East Indies. But on arriving at New South Wales, the captain being ordered by his owners to proceed on a trading voyage to New Zealand, and from thence direct to South America; proceeded to New Zealand with passengers, and was returning from thence to New South Wales, when the ship was totally lost; held, that the sailing from New South Wales to New Zealand, and back, was a deviation from the voyage insured, by which the insurers were discharged; for at the time of the loss, the ship was on a distinct voyage, not connected with either of the voyages contemplated by the parties as the principal objects of the contract.^d

Leave granted in a policy of insurance on a fishing voyage Policy on to see prizes into port, does not authorise to remain in port till a fishing a prize receives necessary repairs, which she could not otherwise *have had; and at most extends to seeing the prize moored safely, and giving necessary orders for her final desti- voyage.

* Gairdner v. Senhouse, 3 Taunt. 16. Bragg v. Anderson, 4 Taunt. 229.

* Hogg v. Horner, Park. 444. Marsh. 184. Ranken v. Reeve, Park, 445.

* Williams v. Shee, 3 Camp. 469.

* Bottomly v. Bovill, 7 D. & R. 702. 5 B & C. 210. (11 Eng. C. L. 204.)

nation.^a Liberty given in a policy on a fishing voyage, to chase, capture, and man prizes, does not authorise the ship to lie by nine days off a port, waiting for an enemy's ship to come out when she should have completed her cargo, although she lay in wait during that time within the limits of her fishing ground.^b

When a ship may trade in the course of her voyage.

It is not an implied condition in a common marine policy on ship and freight, that the ship shall not trade in the course of her voyage, if that may be done without deviation or delay, or otherwise increasing the risk of the insurers; therefore where a ship was compelled in the course of her voyage to enter a port for the purpose of obtaining a necessary stock of provisions, which she could not obtain before in the usual course, by reason of a scarcity at her lading ports; and during her justifiable stay in the port so entered for that purpose, she took on board bullion there on freight, which the jury found did not occasion any delay in the voyage; it was held, not to avoid the policy.^c If a ship has liberty to touch at a port, it is no deviation to take in merchandize during her allowed stay there, if she does not by means thereof exceed the period allowed for her remaining there.^d It is equivalent to a deviation if a ship insured on a trading voyage on the coast of Africa stay there beyond the usual time as a receiving ship.^e

A deviation may be justified by necessity.

*1198

If a deviation be justified by necessity, it will not avoid the contract, or discharge the insurer; as if the ship be obliged to depart from the direct or usual course by stress of weather;^f or for necessary repairs,^g or to join a convoy,^h or to avoid capture or detention,ⁱ or through the mutiny of the crew,^j or on account of the sickness of the master or mariners,^k it will not determine the contract; provided the captain in departing from the usual course, act *bonâ fide* and according to the best of his judgment, for the benefit of all parties.

If a ship is driven out of her course by a storm, she is not obliged to return back to the point from whence she was driven, but may make the best of her way to the port of destination.^l

Where a policy of insurance contains no warranty against

^a Jarratt v. Ward, 1 Camp. 263.

^b Hibbert v. Halliday, 2 Taunt. 428. See Lawrence v. Sidebottom, 6 East, 45. Parr v. Anderson, *Id.* 202.

^c Raine v. Bell, 9 East, 195.

^d Urquhart v. Barnard, 1 Taunt. 450.

^e Hartley v. Buggin, Marsh. 194.

^f Delany v. Stoddart, 4 T. R. 22.

^g Gilbert v. Readshaw, Park, 454. Motteux v. London Assurance Company, 1 Atk. 545.

^h D'Aguilar v. Tobin, Holt, 185. Campbell v. Bordieu, 2 Stra. 1265.

ⁱ Blackenhagen v. London Assurance Company, 1 Camp. 454. Driscoll v. Bovil, 1 B. & P. 313.

^j Elton v. Brogden, 2 Stra. 1264.

^k When sickness of the master or crew is set up as an excuse for deviation, it is incumbent on the plaintiff to show that proper medicines and necessaries for the voyage were on board, in a case where the nature of the voyage requires that there should be a surgeon on board. Per Lord Eldon, C. J., in Woolf v. Claggett, 3 Esp. 257.

^l Harrington v. Halkeld, Park, 455.

seizure in port, if the ship to avoid such seizure runs to sea before she is properly loaded, and is in consequence obliged to go to a port out of the direct course of the voyage insured; the underwriters are liable for a subsequent loss.^a Otherwise where the policy contains a warranty against seizure in port.^b If she is forced by stress of weather into any port under that clause, she is not protected in breaking bulk while at such port; if she does, it avoids the policy.^c Policy on goods on board a particular ship from *A.* to *B.* "against sea-risk and fire only;" in the course of the voyage from *A.* to *B.* the ship was carried out of the course of the voyage by a king's ship; but being afterwards released, she proceeded on the voyage insured, and while so proceeding, the goods insured sustained sea-damage; held, that the underwriters were liable for this loss: for the ship was carried out of the course of her voyage by force; and deviation occasioned by force, is the same as that occasioned by necessity.^d But it is a deviation if the master leaves a port for a particular purpose, by the command of the captain of a king's ship lying there, without any remonstrance.^e

A policy of insurance from Bristol to Monte Video, or other port in the river Plate, where the ship, after arriving off Maldonado, "at the mouth of the Plate, was immediately ordered off by the British commander there, (the enemy having before gotten possession of every other port in the river,) will not discover a loss which happened to the goods insured by a peril of the sea after the ship's departure from thence, in her way to Rio Janeiro, which was the nearest friendly port, and to which she was under a necessity of going for water and repairs; for the policy containing a contract for a specific voyage, could not be extended by implication, however necessary it might be that the voyage should be altered.^f

Where there is a contract for a specific voyage, a deviation cannot be justified.
*1199

If the captain of a ship, on hearing that there is an embargo laid on ships at the port of destination, waits at some place near thereto till the embargo be removed, he will be protected by the policy; but if he might put into a friendly port in the neighborhood, and instead of doing so sails back to the port of outfit and is lost, he will be considered as having abandoned the voyage insured, and the underwriters will be discharged.^g

^a O'Reilly v. Gonne, 4 Camp. 249.

^b O'Reilly v. Royal Exchange Assurance Company, 4 Camp. 246.

^c Still v. Wardell, 2 Esp. 610.

^d Scott v. Thompson, 1 N. R. 181.

^e Phelps v. Auldjo, 2 Camp. 350.

^f Parkin v. Tanno, 11 East, 22. 2 Camp. 59. Nielson v. De la Cour, 2 Esp. 619.

^g Blackenham v. London Assurance Company, 1 Camp. 454.

SECTION XVII.

ILLEGAL VOYAGE.

An insurance cannot be effected upon a voyage or traffic in contravention of the laws of this kingdom.

It may be laid down as a general rule that no insurance can be legally effected upon a voyage undertaken contrary to the laws of this kingdom or those of its dependencies, or to the law of nations. Therefore, if the voyage or the traffic in which the ship is engaged be illegal, an insurance effected thereupon is void, and cannot be enforced;^a and it is immaterial whether the insurer was apprised of the illegality of the voyage, or not.^b If there be anything illegal in the transaction during any part of the time that the policy attached, the policy is void; as if a ship be insured "at and from *A.* to *B.*, and there be any illegality in the traffic during her stay at *A.*, the assured cannot recover on the policy for a loss happening between *A.* and *B.*

*1200

*But in order to render the insurance illegal, the illegality should exist during the course of the voyage insured; therefore an insurance on a ship for a particular voyage may be legal, though she may have done some act in a former voyage for which she was liable to seizure; and goods may be insured though purchased with the proceeds of a former illegal cargo.^c But if there be any illegality in the commencement of an integral voyage, and an insurance be effected on the latter part of the voyage, which taken by itself would be legal, still the assured cannot recover on the policy.^d

The stat. 47 Geo. III, c. 2, legalized, from September 17, 1806, the trading to any place which then was, or should thereafter be, under the dominion of his majesty. Buenos Ayres was taken by his majesty's troops in the preceding year, and retaken on the 12th of August, 1806; held, that an adventure to Buneos Ayres, commencing in the first week of September, 1806, was illegal, and the policy on it void.^e

Trade carried on in violation of a blockade, is illegal.

Trade carried on in violation of a blockade or embargo, of the provisions of a treaty, or of a royal proclamation, is illegal, and a policy effected on the ships, goods, or freight is void.^f If a ship, without notice of a blockade, proceeds to a port which is blockaded, and be captured, the policy is not thereby vitiated; and a notification of the blockade in the gazette is not conclusive of the knowledge of the insured of that fact, "although," said Lord Tenterden, C. J., "the blockading nation may, by the law of nations, be allowed to consider its notifica-

^a See *ante*, 1132.

^b Marsh. 191.

^c Bird v. Appleton, 8 T. R. 562.

^d Marryatt v. Wilson, 8 T. R. 31. 1 B. & P. 430. Bird v. Pigou, S. N. P. 981.

^e Toulmin v. Anderson, 1 Taunt. 237.

^f Delmada v. Motteux, Park, 357. 1 T. R. 85. The Hurtige, 3 Rob. Adm. Rep. 324. Jones v. Tobias, 1 Id. 329.

tion of a blockade as a notice thereof to all the subjects of the nation to which the notification has been made, yet such rule cannot be applied to the case of insurance; knowledge, like other matters, must become a question of fact for the decision and judgment of a jury."^a Therefore, when a ship sailed for a foreign port, and notice afterwards appeared in the gazette that such port was blockaded; the ship having been captured, it *was held to be a question of fact for the jury, in an action on the policy, whether the captain knew of the blockade or not.^b *1201 If after notice of a blockade a policy is effected to the port that is blockaded, and the ship sails for the purpose of enquiring whether the blockade is continued, and is captured, the policy is not thereby vitiated, for the voyage is not illegal in its inception.^c

The Navigation Act, 6 Geo. IV, c. 109, requires that certain Foreign ships shall be navigated by a crew of which three parts are crew. British; an exemption is given if a due proportion of such seamen cannot be procured in any foreign port; or if the proportion be destroyed during the voyage by any unavoidable circumstance, and the master bring a certificate of the facts from a British consul, or prove the facts to the satisfaction of the comptroller of the customs in a British port; held, that a ship which lost her proportion of British seamen, by death, at Sierra Leone, and could not replace them except by foreigners, was within the exemption, and the vessel having been lost on her voyage home with an over proportion of foreign hands, the insured was not precluded from recovering from the underwriters, though he had not the certificate required by the act, the circumstances of excuse having been satisfactorily proved to a jury at the trial.^d

By the common law, no British subject can legally trade Trading with an enemy without a license is illegal. with the enemy's country, and the property engaged is subject to confiscation in a court of prize. Every contract of insurance, therefore, effected on the property of an enemy, or on goods purchased even by a British subject in an enemy's country, is void.^e But a license from the crown will legalise a trading with the enemy, and protect the exportation of goods which is prohibited by proclamation; and an insurance may be legally effected on commerce which is protected by such license.

Licenses to trade with an enemy are to be construed liberally, *and not, like grants of property from the crown, strictly; and *1202 therefore, although the agent, in obtaining the license, did not Construe-

^a Per Lord Tenterden, C. J., in *Harratt v. Wise*, 9 B. & C. 717. (17 Eng. C. L. 478.)

^b *Id.*

^c *Naylor v. Taylor*, 9 B. & C. 718. (17 Eng. C. L. 480.) *Dalglish v. Hodgson*, 7 Bing. 495. (20 Eng. C. L. 216.) 5 M. & P. 407.

^d *Stuart v. Powel*, 1 B. & Ad. 266. (20 Eng. C. L. 384.)

^e *Potts v. Bell*, 8 T. R. 548.

tion of
licenses.

represent to the privy council that he applied on behalf of an hostile trader, the concealment did not vacate the license, or vitiate the policy.^a So, a misdescription of a party applying to the crown for a license to trade with an enemy, if made without fraud, does not vacate the license, or vitiate a policy effected upon it. As where he was described to be "of London, merchant:" whereas he was resident at the time at Heligoland, from whence he passed into Germany, intending to return immediately, and settle in London.^b

A license to *F. H.* of London, merchant, on behalf of himself and other British or neutral merchants, to import a cargo from certain limits, within which an enemy's port is situate, in any vessel bearing any flag except the French, will protect a ship trading from that port, in which ship *F. H.* and an alien enemy are jointly interested; and therefore such interest was held insurable.^c So, under a license to British brokers resident here, that a ship bearing any flag may import from an enemy's country, to whomsoever the property may appear to belong; three British subjects not named in the license, one of whom resides in an hostile country, may import from another hostile country to this.^d So a license to *H. S.*, a British merchant, that a ship may go to a hostile port, and bring home a cargo of goods, authorises the importation of such goods, being the property of an alien enemy, a subject of that hostile country, and therefore authorises him to insure and enforce his contract of insurance in our courts.^e

Where a license is granted for a voyage to an hostile country, to continue in force till a given day, if the voyage is *bond fide* begun before that day, it continues to be protected by the
*1203 "license, though delayed beyond the day by stress of weather, or other accident, over which the assured have no control.^f

If a vessel imports under a license a cargo of goods from an hostile country, and also certain other goods not licensed, the insurance on the licensed goods is not thereby vitiated.^g Therefore, where a quantity of gunpowder was exported, for a part of which only a license had been obtained; it was held, that the exportation of the excess only was illegal; and that an insurance effected on the whole cargo, might be supported as to so much for which the license was obtained, whether the property of the same or of different persons.^h

An importation from an hostile port by an alien enemy there

^a *Flindt v. Scott*, and *Same v. Crockett*, 5 Taunt. 674. (1 Eng. C. L. 231.) 15 East, 525.

^b *Vaughan v. Lemecke*, (in Error,) 7 D. & R. 236. (16 Eng. C. L. 283.) 8 Moore, 646. 1 Bing. 473, (8 Eng. C. L. 386,) overruling *Klingender v. Bond*, 14 East, 484.

^c *Hagedorn v. Reid*, 1 M. & S. 567. Camp. 377.

^d *Fayle v. Bourdillon*, 3 Taunt. 546. ^e *Morgan v. Oswald*, 3 Taunt. 554.

^f *Groning v. Crockett*, 3 Camp. 83. *Skiffin v. Glover*, 4 Taunt. 717. *Esfurth v. Smith*, 5 Taunt. 329. (1 Eng. C. L. 123.)

^g *Pieschell v. Allnutt*, and *Same v. Lavis*, 4 Taunt. 792.

^h *Keir v. Andraade*, 2 Marsh. 196. 6 Taunt. 498. (1 Eng. C. L. 465.)

resident, may be legalised by a license to *R.*, on behalf of a British merchant, for a ship not named; but in order so to legalise it, it is not sufficient that the ship's name should be indorsed at the hostile port of loading on the license; the assured must also prove by what authority he applies the license so obtained to that adventure.^a But a license to trade to an enemy's country, granted to one set of British merchants, cannot be used to cover a trading by other British merchants, without connecting them together; as by showing that the parties licensed were agents at the time for the others.^b

SECTION XVIII.

MISREPRESENTATION AND CONCEALMENT.

	PAGE		PAGE
1. Misrepresentation.		2. Concealment.	1205

1.—*Misrepresentation.*] A FALSE representation by the insured or his agent, whether in writing or by parol, respecting any fact or circumstance, the belief of which may reasonably be supposed to influence the insurer in undertaking the risk, or *calculating the premium, will avoid the policy; for it is deemed a fraud on the insurer. And it is immaterial whether the insured make the representation innocently or fraudulently.^c But a representation made by the insured *bond fide* upon probable expectation or on his belief, will not vitiate the policy, though it turn out to be untrue; for the underwriters might inquire into the grounds of his expectation or belief.^d(1)

A false representation will avoid the policy.
*1204

Where the broker who effected the insurance reported that the ship was seen safe on such a day, and had performed two-thirds of her voyage, and it turn out that she had got as far as was represented, but was lost two days before the day mentioned; held, that the mistake was material, and vitiated the policy.^e So a statement made by the broker at the time of

^a Robinson v. Morris, 5 Taunt. 720. (1 Eng. C. L. 247.)

^b Busk v. Bell, 16 East, 3.

^c Marsh. 453. Per Lord Mansfield, C. J., in Pawsen v. Watson, Cowp. 788. But see Flinn v. Tobin, M. & M. 367, (22 Eng. C. L. 336,) per Lord Tenterden.

^d Barber v. Fletcher, Doug. 292. Hubbard v. Glover, 3 Camp. 313. Bowden v. Vaughan, 10 East, 415.

^e Macdowall v. Fraser, Dougl. 260.

(1) (An application for insurance from *Rio de la Plata* to *Havana*, which stated, "said vessel will sail from *La Plata* in the course of this month," made by a merchant in *Baltimore*, to an insurance company there, is not to be regarded as a technical representation of the time of the vessel's departure, but as a statement merely of the belief or opinion of the applicant, that she would sail at the time mentioned. *Allegre's Admrs. v. The Maryland Ins. Co.*, 2 Gill & Johns. 136.)

effecting a policy that the ship was ready to sail on a particular day, when in fact she had sailed on the day before, was held to be such a material misrepresentation as to vitiate the policy.^a

So, where a London merchant, insuring at Leith; represented (contrary to the fact,) that he had done some insurances at Lloyd's, upon the same voyage, at the same premium given to the Leith underwriters, who, not being well acquainted with the nature of the risk themselves, subscribed the policy, from their confidence in the skill and judgment of the London underwriters; held, by the House of Lords, reversing the judgment of the court of sessions, that this was a fraud which vitiated the policy, though the misrepresentation was not such as affected the nature of the risk.^b

The insurer must be deceived.

If the insurer be not deceived by the misrepresentation, it will not avoid the policy. As where the agent of the insured made a false representation, but it did not appear that the underwriter was thereby induced to accept the risk; held, that the jury were warranted in finding that the misrepresentation was not material, and that the policy was not thereby vitiated.^c *If a representation be *substantially* correct, it is sufficient.^d A misrepresentation made to the *first* underwriter, is a misrepresentation to all who sign after him, so as to vitiate the whole policy, otherwise it might be a contrivance to deceive many; for when a respectable underwriter stands first on the policy, the rest subscribe without asking a question.^e

The concealment of a material fact will vitiate the policy.

2.—*Concealment.*] The concealment or suppression of any fact or circumstance *material* to the risk will also avoid the policy. It is established by the law of every mercantile state, and the uniform decisions of the courts at Westminster, that the suppression or concealment of material intelligence respecting a matter of insurance, whether fraudulent or not, vitiates the policy.^f

It is the duty of the assured not only to communicate to the underwriter articles of intelligence which may affect his choice, whether he will insure at all, and at what premium he will insure, but likewise all rumors and reports which may tend to enhance the magnitude of the risk.^g(1) So, any person acting

^a *Ellis v. Brutton*, Park. 269.

^b *Sibbald v. Hill*, 2 Dow. 263.

^c *Flinn v. Headlam*, 9 B. & C. 693. (17 Eng. C. L. 473.) See *Planche v. Fletcher*, Doug. 238.

^d Per Lord Mansfield, in *De Hahn v. Hartley*, 1 T. R. 343. *Norman v. Reid*, 16 East, 176. *Bize v. Fletcher*, Doug. 271.

^e Per Lord Mansfield, C. J., in *Pawson v. Watson*, Cowp. 787. *Barber v. Fletcher*, Doug. 305. *Marsden v. Reid*, 3 East, 572. *Brine v. Featherstone*, 4 Taunt. 869. *Bell v. Corstairs*, 3 Camp. 543. 14 East, 374.

^f *Thompson v. Buchanan*, 4 Bro. P. C. 462. *Carter v. Boehm*, 3 Burr. 1905. Per *Bayley, J.*, 8 B. & C. 592. (15 Eng. C. L. 308.)

^g *Lynch v. Hamilton*, 3 Taunt. 37. *Durrell v. Bederley*, Holt, 283. (3 Eng. C. L. 104.)

(1) (*Green v. The Merchants' Ins. Co.*, 10 Pick. 402. *Fiske v. The New England Marine Ins. Co.*, 15 Pick. 310.)

by the orders of the insured, and who is anywise instrumental in procuring the insurance, is bound to disclose all he knows to the underwriter, before the policy is effected.^a

Any fact which, if communicated to the underwriter, would induce him either to refuse the insurance altogether, or not to effect it without a greater premium than ordinary, is a material fact, the concealment of which, though without fraud, will vitiate the policy; a letter containing facts which, if communicated, would lead to an inquiry which would produce important information, is material and ought to be shown to the underwriter.^{b(1)}

What is a material fact.

*1206

Whether the fact or intelligence concealed was or was not material and ought to be communicated to the underwriter, is a question for the jury under the circumstances of the case; the opinion of the underwriters on that subject, it seems, is inadmissible.^c The authorities, however, on this point are not uniform. Where a merchant shipped goods from Sidney to England in the ship *C.*, and by another ship that sailed afterwards wrote to his agent in England, desiring him, if he received that before the arrival of *C.*, to wait thirty days to give a chance for her arrival and then insure the goods; the agent, having waited more than thirty days, employed a broker to effect the insurance, and handed the letter to him; the broker told the underwriters when the *C.* sailed, and when the letter was written, but he did not state when it was received, nor the order to wait thirty days after the receipt of it, before the insurance was effected; the ship *C.* having been lost, an action was brought on the policy, and several underwriters were examined to show that in their opinion, the facts not communicated were material; held, that such evidence was properly received, and that, under the circumstances, the jury were bound to find that the part of the letter not communicated to the underwriters was material, and consequently that the policy was void. "I know not," said Lord Tenterden, C. J., in delivering the judgment of the court, "how the materiality of any matter is to be ascertained, but by the evidence of persons conversant with the subject matter of the inquiry."^d But the plaintiff (the insured)

The materiality of the fact concealed is a question for the jury; the opinion of underwriters on that subject is not admissible in evidence.

^a *Fitzherbert v. Mather*, 1 T. R. 12.

^b *Elton v. Larkins*, 8 Bing. 198. (21 Eng. C. L. 369.) 1 M. & Scott, 323. *Bridges v. Hunter*, 1 M. & S. 15. *Beckwith v. Sidebotham*, 1 Camp. 116. *Willes v. Glover*, 1 N. R. 14.

^c *Carter v. Boehm*, 3 Burr. 1905. *Durrell v. Bederley*, Holt, 285. (3 Eng. C. L. 104.) *Campbell v. Rickards*, 5 B. & Ad. 840. (27 Eng. C. L. 207.) *Lindeman v. Desborough*, 8 B. & C. 586. (15 Eng. C. L. 306.)

^d *Rickards v. Murdock*, 10 B. & C. 527. (21 Eng. C. L. 123.) *Berthon v. Loughman*, 2 Stark. 258. (3 Eng. C. L. 340.) See *Chapman v. Walton*, 10 Bing. 57. (25 Eng. C. L. 28.) 3 M. & Scott, 389.

(1) (*Maryland and Phoenix Ins. Cos. v. Bathurst*, 5 Gill & Johns. 159.)

It is true as a general rule, that in an order for insurance upon a vessel, it is not necessary to state the nature or condition of the cargo designed to be transported. If the underwriters desire information on that subject it is for them to ask it. *The Chesapeake Ins. Co. v. Allegr's Adm.*, 2 Gill & Johns. 164.)

in the preceding case having subsequently brought an action against the broker for negligence in having suppressed material facts when he effected the policy, and the underwriters having *1207 been again examined as to the materiality of that part of the letter which was not communicated; the court held, that their evidence was improperly received. "Witnesses," said Lord Denman, C. J., in delivering the judgment of the court, "conversant in a particular trade, may be allowed to speak to a prevailing practice in that trade; scientific persons may give their opinion on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced if the parties had acted in one way rather than another. It is not a question of science in which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, in which the diversity might be endless."^a

Instances
of conceal-
ment
which vi-
tiated the
policy.

Where the party delayed to insure until after the arrival of another ship, which sailed at the same time with the ship insured, it was held that a concealment of this circumstance avoided the policy.^b So a concealment of the ship having been long out at sea, was held to vitiate the policy.^c So a concealment of the true port of loading.^d So a concealment of the property insured belonging to a foreigner.^e It is sufficient if the insured communicates all facts within his knowledge; he is not bound to state any opinion or conclusion founded on such facts.^f So where the insured knew his ship had sailed from the coast of Africa on a certain day, only stated that she was on the coast on that day: held, that it was a material concealment and vitiated the policy.^g So where a ship had sailed from Elsinour, on her voyage home, six hours before the owner, who followed in another vessel on the same day, and having met with rough weather in his passage, arrived first, and then caused an insurance to be effected on his own ship; held, that these circumstances were material to be communicated to the underwriter, and that it was not sufficient to state merely that the *1208 "ship insured was "all well at *E.* on the 26th July," the day of her sailing.^h So where an insurance was effected on goods at a premium of ten guineas per cent., to return five per cent. for convoy and arrival. The assured concealed from the underwriter that the vessel was to be a running ship, although he was aware of it; held, that this was a concealment of a fact material to the risk, and avoided the policy.ⁱ

Where the contract is made through the medium of a broker

^a *Campbell v. Rickards*, 5 B. & Ad. 840. (27 Eng. C. L. 207.) 2 N. & M. 542.

^b *M'Andrew v. Bell*, 1 Esp. 373.

^c *Webster v. Foster*, 1 Esp. 407.

^d *Hodgson v. Richardson*, 1 Bl. 463.

^e *Campbell v. Innes*, 4 B. & A. 423. (6 Eng. C. L. 472.)

^f *Bell v. Bell*, 2 Camp. 475.

^g *Ratcliffe v. Shoolbred*, Marsh. 466.

^h *Kirby v. Smith*, 1 B. & A. 672. And see *Westbury v. Aberdeen*, 2 Mees. & Wels. 267. 1 Mur. & Hur. 49.

ⁱ *Reid v. Harvey*, 4 Dow. 97.

the rule is, that the broker must communicate whatever is in the special knowledge of the insured, but he is not bound to communicate matters which are, as it were, in the middle between the insured and the underwriter; he is not bound to make a laborious disclosure of what is known to all.^a

Underwriters are bound to know the nature and peculiar circumstances of the branches of trade to which the policy relates; and if any usage be general, though not uniform, they are bound to take notice of it; withholding from them information relating to such matters will not vitiate the policy.^b (1) Where on an insurance on goods from London to Jamaica generally, the goods insured were destined to a particular plantation in that island, and the usual course in such a case was for the ship to proceed to an adjoining port, and there tranship her cargo into shallops, but no communication of this fact was given to the underwriters; held, that they were still liable for a loss which occurred after such transhipment on board the shallops.^c

Withholding information respecting any matter known in the trade, will not vitiate the policy.

In effecting a policy it is not necessary for the insured to communicate circumstances stated in Lloyd's list, for they are presumed to be known to the underwriters.^d But it has been held that the announcement in such list of the sailing of the ship out of the port at which it was insured, did not dispense with the insured's disclosing a letter received from his captain before the policy was effected, announcing the day of the intended departure, that fact being deemed material.^e Where it was known at Lloyd's that the *Sophia* of Bristol was at sea without convoy, and the broker inquired of the plaintiff at Bristol, whether that was the ship insured, and was informed it was, and that the plaintiff supposed she had been prevented by adverse winds from joining convoy at Falmouth, but the broker got the policy altered without disclosing this answer to the underwriters; held, that this concealment vacated the policy.^f

Circumstances stated in Lloyd's list need not be communicated.
*1209

^a Per Lord Ellenborough, C. J., in *Vallance v. Dewar*, 1 Camp. 507.

^b *Id.* *Da Costa v. Edmunds*, 4 Camp. 142. *Noble v. Kenaway*, Doug. 510. *Kington, v. Knibbs*, 1 Camp. 508. *Grant v. Poxton*, 1 Taunt. 463. *Planche v. Fletcher*, Doug. 257.

^c *Stewart v. Bell*, 5 B. & A. 238 (7 Eng. C. L. 81.)

^d *Friere v. Woodhouse*, Holt, 572. (3 Eng. C. L. 187.) *M'Andrew v. Bell*, 1 Esp. 373. *Court v. Martineau*, 3 Doug. 161. (26 Eng. C. L. 66.)

^e *Elton v. Larkins*, 8 Bing. 198. (31 Eng. C. L. 269.) 1 M. & Scott, 323.

^f *Sawtell v. Loudon*, 5 Taunt. 359. (1 Eng. C. L. 133.) 1 Marsh. 99.

(1) (*Maryland and Phoenix Ins. Cos. v. Bathurst*, 5 Gill & Johns. 159. *Green v. The Merchant's Ins. Co.*, 10 Pick. 402.)

SECTION-XIX.

RETURN OF PREMIUM.

If no risk has been run, the insured is entitled to a return of premium; but not, if the risk has once commenced.

WHENEVER the contract of insurance is void, without any fraud on the part of the insured, or whenever the risk has not been run, though it be owing to the fault or negligence of the insured, the insured will be entitled to a return of premium; but if the risk has once commenced, the insured is not entitled to a return of premium unless there be an express stipulation to that effect. "There are two general rules applicable to this subject; the first is, that where the risk has not been run, whether its not having been run was owing to the fault, pleasure or will of the insured, or to any other cause, the premium shall be returned; because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and to whatever cause it be owing, if he does not run the risk, the consideration, for which the premium or money was put into his hands, fails and therefore he ought to return it. Another rule is, that if that risk of the contract of indemnity has once commenced, there shall be no apportionment or return of premium afterwards. For though the premium is estimated, and the risk depends upon the nature and length of the voyage, yet, if it has commenced, though it be only for twenty four-hours or less, the *risk is run; the contract is for the whole entire risk, and no part of the consideration shall be returned."^a

*1210

If there be two distinct risks, and one only has been run, the insured is entitled to a return of an apportionment of the premium.

If an insurance be effected on two distinct risks, or voyages, and one of them only has been run or commenced, the insured is entitled to a return of an apportionment of the premium. Thus, in an insurance of a ship at and from Hull to Bilboa, warranted to depart from England with convoy, the voyages from Hull to Portsmouth, where she meets with convoy, and from thence to Bilboa, may be considered as distinct; and in case of a loss between the two latter places, an apportionment and return of premium may be demanded.^b So upon a policy at and from London to Halifax, warranted to depart with convoy from Portsmouth, the contract and risk are divisible at Portsmouth as two independent contracts and risks; and if the risk of the voyage from Portsmouth to Halifax has not been run, as where the convoy was gone before the arrival of the ship, the insured is entitled to a return of the premium.^c But in an in-

^a Per Lord Mansfield, C. J., in *Tyrie v. Fletcher*, Cowp. 668. *Stephenson v. Snow*, 3 Burr. 1240. *Lorraine v. Tomlinson*, Doug. 587.

^b *Rothwell v. Cooke*, 1 B. & P. 172.

^c *Stevenson v. Snow*, 3 Burr. 1237. Where a total loss is recovered, there cannot also be a return of premium for convoy, because the total loss includes the entire premium added to the invoice price. *Langhorn v. Allnutt*, 4 Taunt. 511.

surance "at and from" the port of departure, the risk is entire, unless there is a usage to the contrary. Therefore, where a ship was insured, "at and from Jamaica to Liverpool, warranted to sail by 1st of August, at twenty guineas per cent. to return eight if she sailed with convoy; and she did not sail until September; held, that the insured was only entitled to a return of eight guineas per cent. for convoy, and not to an apportionment of the rest of the premium.^a Where the policy was "at and from Jamaica to London, warranted to depart with convoy for the voyage, and to sail on or before the 1st of August," and the ship sailed before that day, but without convoy; and a jury had found an invariable usage in such voyages to return the premium with a deduction of half per cent. either when the ship sailed before the day without convoy, or after it in any case; held, that an action for a return of the premium would lie.^b

*Whenever the risk is entire, and has once commenced, there can be no apportionment of premium; whether the policy be effected for a certain period of time, or upon a certain voyage. Thus, in a policy at and from London to any port or place whatsoever for twelve months, at nine per cent., warranted free from capture, there shall be no return of premium, though the ship be captured before the end of two months; for the risk was entire and had commenced.^c So where a ship is insured for twelve months, at the rate of so much per month, though the risk cease at the end of two months, there shall be no apportionment nor return of premium.^d An insurance on a ship and goods, at and from *A.* to *B.*, during her stay and trade there, at and from, to her port or ports of discharge in *C.*, and at and from thence back to *A.*, is an entire contract, and if the loss happen at any time after the commencement of the risk, there shall be no return of premium.^e

If through mistake or any other innocent cause, an insurance be made without interest, or for more than the real interest, there shall be a return of premium. As if a man, supposing he has goods on board a certain ship to the value of 1,000*l.*, insures to that amount, and afterwards finds out that he has no goods at all on board, or that he has goods only to the amount of half the insurance; in the one case he would be entitled to a return of the whole premium, in the other to a return of the moiety.^f Where recaptors of a ship insured it, and in an action on the policy, the defence was, that the insured had no interest in the subject-matter, as it was vested in the crown; the court held, that as there was no fraud in the captors in effecting the policy, and as the resistance of the underwriters to the claim of the insured proceeded on the ground that there was no risk, the insured were entitled to a return of the premium.^g

*1211
If the risk be entire there can be no apportionment of premium.

If, in the absence of fraud, an insurance is made without interest, there shall be a return of premium, unless a risk has been run.

^a *Meyer v. Gregson*, Marsh. 666.

^b *Tyrie v. Fletcher*, Cowp. 666.

^c *Bernson v. Woodbridge*, Doug. 781.

^d Marsh. 639.

^e *Routh v. Thompson*, 11 East, 428. In an action on a policy of insurance, with a

^f *Allen v. Long*, Park, 580. Marsh. 668.

^g *Lorraine v. Tomlinson*, Doug. 585.

But if a risk has been run, the insured will not be entitled to a return of premium, even though he had no title or interest. As where there was an insurance on ship and freight, and the ship arrived in safety and earned freight, the court held, that the assured could not afterwards claim a return of premium on the ground that he had no insurable interest on account of a defect in his title to the ship; for as the voyage had been performed, and the ship had arrived in safety, and the freight had been earned and paid it was too late for the plaintiff to say he had no insurable interest. He might have rescinded the contract before the event; but after that had been determined in favor of the underwriters, it did not lie in his mouth to tell them that they never were liable.

Where the captors of a ship seized as a prize, insured her before condemnation, and she was afterwards adjudged to be no prize, and restitution was awarded to the owners; it was held, that the insured were not entitled to a return of premium, as the risk had been run; for they had an insurable interest, inasmuch as they had possession of the property insured, and if it were a legal capture, they were entitled; if it were not, the Court of Admiralty might amerce them in the damages and costs, and they had a right to insure themselves against a decision which might have loaded them with damages and costs.*

But the insured is entitled to a return of premium, whenever the risk does not attach, and he acts *bond fide*. As where on policy at and from Gottenburgh to Riga, upon goods and ship, beginning the adventure upon the goods from the loading thereof aboard the ship at Gottenburgh; it appeared that there were not any goods laden at Gottenburgh, but only at London; it was held, that as the risk upon the goods never commenced, the plaintiff was entitled to a proportional return of premium;* and, on the same principle, if the voyage be unavoidably prevented, the insured is entitled to a return of the premium. As where a policy was made on a foreign port, and a war broke out, which was unknown to the insured, whereby the voyage

*1213

was prevented; held, that the insured was entitled to a return of the premium.⁴ So where a license for a voyage had been obtained, but not till after the voyage had commenced, which was therefore invalid, as it could not operate retrospectively. So where the broker represented that the ship had a French license, but had mistaken a pass, which only enabled the ship to

count for money had and received, if the defendant pay no money into court, but establish as a defence that the risk never commenced, the plaintiff is entitled to a verdict for the premium, though no demand of premium was made by his counsel in opening the case. *Penson v. Lee*, 2 B. & P. 330.

* *M'Culloch v. Royal Exchange Assurance Company*, 3 Camp. 406.

* *Boehm v. Bell*, 8 T. R. 154.

* *Horneyer v. Lushington*, 15 East, 46. 3 Camp. 90.

* *Oom v. Bruce*, 12 East, 225.

* *Hentig v. Staniforth*, 5 M. & S. 122. 4 Camp. 270. *Siffken v. Allnutt*, 1 M. & S. 39.

go down the Elbe, for a license to trade with England, the insured was held to be entitled to a return of premium, as the risk never attached, and there was no fraud.^a

But if the insured be guilty of fraud; as where he altered the policy without the consent of the insurer;^b and where he knew that the ship was lost before he effected the policy;^c or if the insurance be illegal, and the voyage has been performed,^d the insured will not be entitled to a return of premium; though the underwriters would not be liable in case of a loss, as in case of a policy intended to cover a trading with the enemy;^e or in contravention of the navigation laws.^f It seems, however, that in case of an illegal policy being effected, if the insured rescinds the contract before the risk is run, he will be entitled to a return of premium.^g

If there be fraud or illegal trading, there shall be no return of premium.

Where there is an agreement to return part of the premium, "if the ship arrive," the assured will be entitled to a return, in the event of an arrival of the ship at the port of destination, although it should appear that the ship has sustained a loss occasioned by a sea risk.^h As where the insurer on freight agreed to return part of the premium "if the ship sailed with convoy and arrived;" held, that the insured were entitled to that return, the ship having sailed with convoy and arrived, though she had been captured and recaptured, and the assured "had been obliged to pay for salvage."ⁱ Where, in a policy on a ship for a year, the underwriter stipulated to return a part of the premium, "if sold or laid up, for every uncommenced month;" held, that the words "laid up" meant a laying up for the season, without being employed for the current year, and that where a vessel, insured for one year, had been laid up for several months during the year, but was employed again during the year, that was not such a laying up as entitled the insured to a return of premium.^j In an action for a return of premium, the policy is conclusive evidence of the receipt of the premium of the defendant.^k

*1214

^a Feize v. Parkinson, 4 Taunt. 640.

^b Langhorn v. Cologan, 4 Taunt. 380.

^c Tyler v. Horne, Park, 329. And see Wilson v. Duckett, 3 Burr. 1361. Chapman v. Fraser, Park, 329.

^d Lowry v. Bourdieu, Doug. 468.

^e Vandeyck v. Hewitt, 1 East, 96.

^f Moreck v. Abel, 3 B. & P. 35. Lubbock v. Potts, 7 East. 449.

^g Lowry v. Bourdieu, *supra*. And see 3 Camp. 408.

^h Symond v. Boydell, Doug. 268. See Dalgleish v. Brook, 15 East, 295. Horn-castle v. Haworth, Marsh. 681.

ⁱ Aguilar v. Rodgers, 7 T. R. 421.

^j Hunter v. Wright, 10 B. & C. 714. (21 Eng. C. L. 152.)

^k Dalzell v. Mair, 1 Camp. 532. And see De Gaminde v. Pigou, 4 Taunt. 246.

SECTION XX.

BOTTOMRY AND RESPONDENTIA.

Of the nature of bottomry and respondentia.

BOTTOMRY is a contract in the nature of a mortgage of a ship, whereby the owner borrows money to enable him to fit out the ship, or to purchase a cargo for the intended voyage, and pledges the keel, or *bottom* of the ship, *purs pro toto*, as a security for the repayment; and it is stipulated, that if the ship be lost, the lender shall lose his money, but if she arrive safe, not only the ship and tackle, but also the person of the borrower, shall be liable for the money lent, with such interest as may have been agreed upon. This contract may be in the form of a bill of sale, or of a deed poll, called a bill of bottomry, executed by the borrower, or of a bond with a penalty.^a *Respondentia* is a contract of a similar nature; it is a loan on the security of the goods on board the ship, the repayment of which is in general made to depend on the safe arrival of the goods. The difference between respondentia and bottomry is, that the one is a loan upon the ship, the other upon the goods, the repayment of which depends on the safe arrival of the ship in one case, and of the goods in the other. In bottomry, the ship and tackle, together with the person of the borrower, are liable for the loan; but in *respondentia*, the lender has in general only the personal security of the borrower, for the merchandize on board must, from its nature, be sold or exchanged in the course of the voyage, and he has no lien upon or interest in the homeward cargo, purchased with the produce of the goods upon which the money was lent.^b

In case of urgent necessity, the master may hypothecate the ship or goods to enable him to complete his enterprise, but he can only do it in a foreign country, where he has no opportunity of communicating with the owner; and the owners are not personally responsible on such contracts, the remedy of the lender is against the ship and the master.^c

An instrument executed in a *foreign* port by the master of a ship, reciting, that his vessel, bound to London, had received considerable damage, and that he had borrowed 1077*l.* to defray the expenses of repairing her, proceeded as follows:—"I bind myself, my ship, her tackle, &c., as well as her freight and cargo, to pay the above sum, with 12*l. per cent.* interest, bottomry premium; and I further bind myself, my ship, &c., to the payment of that sum in eight days after my arrival at the

^a Menetone v. Gibbons, 3 T. R. 267. Marsh. 738.

^b *Id.* Busk v. Fearon, 4 East, 319. And see Sumner v. Green, 1 H. Bl. 301. 2 Bl. Com. 458.

^c Lister v. Baxter, 2 Stra. 695. Abbott Ship. 125. La Isabel, 1 Dodson, 273. Case of the Gratitude, 3 Robinson, 240.

port of London; and I do hereby make liable the said vessel and her cargo, whether she do or do not arrive at the port of London, in preference to all other debts or claims, until such principal sum, with 12*l. per cent.* bottomry premium, and all charges are duly paid;" held, upon error, that this was an instrument of bottomry, for an intention sufficiently appeared from the whole of it, that the lender should take upon himself the peril of the whole voyage, and that the words, "my arrival," must be understood to mean, "my ship's arrival."^a

An assured on bottomry cannot recover against the underwriter, unless there has been an actual total loss of the ship; for if the ship exist in species, in the hands of the owners, *though under circumstances that would entitle the assured on the ship to abandon, it will prevent its being an utter loss within the meaning of the bottomry bond.^b A lender on bottomry cannot recover if a loss happen by capture, if it be such as to occasion a total loss; but if the ship be taken and detained for a short time, and yet arrive at the port of destination within the time limited, (if the time be mentioned in the condition,) the bond is not forfeited, and the obligee may recover.*

The assured upon bottomry cannot recover unless there be a total loss of the ship
*1216

An action cannot be maintained on a policy of insurance where the plaintiff's interest is founded on a bottomry bond made jointly to the plaintiff and another, although they are general partners in trade,^c for the bond is void under 6 Geo. I, c. 18, which prohibits lending by partners on bottomry. The court of admiralty have jurisdiction over hypothecation instruments made in a foreign country.*

Partners cannot lend on bottomry.

By stat. 7. Geo. I, c. 21, s. 2, all contracts entered into by any of his Majesty's subjects, or any person in trust for them, for the loan of any money by way of bottomry on any ship in the service of foreigners, and bound to or designed to trade in the East Indies, are void."

By stat. 19 Geo. II, c. 37, s. 5, "all money lent on bottomry, or at respondentia, upon ships belonging to any of his Majesty's subjects, bound to or from the East Indies, must be lent only on the ship, or upon the merchandises on board, and shall be so expressed in the condition of the bond, and the benefit of salvage shall be allowed to the lender, who alone shall have a right to make insurance on the money so lent; and no borrower of money shall recover more than the value of his interest on the ship, or in the effects laden on board, exclusive of the money so borrowed; and in case it shall appear that the value of his share in the ship, or the effects on board, does not amount to the full sum he has borrowed, such borrower shall

Bottomry upon ships trading to or from India.

^a Simonds v. Hodgson, 3 B. & Ad. 50, (23 Eng. C. L. 29,) overruling S. C. 6 Bing. 114. (19 Eng. C. L. 22.)

^b Thompson v. Royal Exchange Assurance Company, 1 M. & S. 30.

^c Joyce v. Williamson, Park, 627. 2 Marsh. 760.

^d Everth v. Blackburne, 2 Stark. 66. (3 Eng. C. L. 247.) 6 M. & S. 152.

^e Johnson v. Shippen, 2 Lord Raym. 982. Menetone v. Gibbons, 3 T. R. 267.

- *1217 be responsible to the lender for so much of the money borrowed as he has not laid out on the ship or merchandise laden thereon, with lawful interest for the same, in the proportion the money laid out shall bear to the whole money lent, notwithstanding the ship or merchandise shall be totally lost."

SECTION XXI.

ACTION ON THE POLICY.

THE form of action on a policy is *assumpsit*, when the policy is not under seal; or *debt*, or *covenant*, when it is under seal. The action may be brought either by the person in whose name it is made, as by a broker or an agent, or by the parties beneficially interested.^a If the policy should be effected in the name of two persons, when only one of them is interested, the action may be brought in the name of that one.^b As the claim in an action on the policy must be for unliquidated damages, unless an adjustment has taken place, the defendant cannot be arrested and held to bail without a judge's order, even in case of a total loss or valued policy.^c

SECTION XXII.

THE DECLARATION AND PLEADINGS.

- WHETHER the action be in *assumpsit*, *debt* or *covenant*, the averments in the declaration are so nearly similar that they may be considered under the same head. The policy must be described in the declaration either in the precise terms in which it is made, or according to its legal effect; qualifications introduced into the policy by means of warranties, or exceptive stipulations, should also be stated.^d Where the regulations of an association of ship-owners, combined for the mutual assurance of each other's ships, were indorsed on the back, and
- *1218 *were declared to form part of the policy to which the ship-owners were subscribers; it was held, that the declaration ought to set out the regulations as well as the policy.^e

^a *Parker v. Beasley*, 2 M. & S. 426. *Hagedorn v. Oliverson*, *Id.* 485. *Park*, 403.

^b *Marsh v. Robinson*, 4 Esp. 98.

^c *Lear v. Heath*, 5 Taunt. 201. (1 Eng. C. L. 76.) *Lambe v. Dubois*, *Id.* 202.

^d 2 Ch. Pl. 103. *Hughes, Ins.* 465. See *Latham v. Rutley*, 2 B. & C. 20. (9 Eng. C. L. 10.)

^e *Strong v. Harvey*, 3 Bing. 304. (11 Eng. C. L. 12.) 11 Moore, 72.

In an action on a valued policy, where the goods had been estimated at too low a sum, and the mistake was corrected by the insertion of an increased sum in the margin, the declaration stated the policy according to its altered state, without noticing the original value, and it was held sufficient; for at the time of the alteration all was *in fieri*.^a But when the alteration has been made after the execution of the instrument, that fact should in general be stated.^b Clauses which do not bear on the plaintiff's cause of action, and which are unnecessary to a just comprehension of it, such as the enumeration of all the perils, when the loss is attributed only to one of them, need not be detailed.^c

Alteration
in the
policy.

The subscription of the defendant to the policy, and his promise to indemnify the insured against the loss, are next stated. When the policy, in the common printed form on the ship and goods, contains a memorandum declaring the insurance to be on goods, a general averment is proper, that the defendant became an insurer on the premises mentioned in the policy.^d

Subscription
of the
defendant.

If the goods be required by the terms of the policy to be laden at a certain port, it must be averred that they were so laden;^e or if the policy be on particular goods, it is proper to state that such goods were put on board. But where the declaration stated, that the policy was on indigo and bale goods, and that divers goods of great value were shipped, and that the insured was interested in them, and that the policy was made on the *said* goods for the use and benefit of the insured; it was held sufficient, on special demurrer.^f

Shipment
of the
goods.

An averment of interest is necessary as well in cases of a policy on foreign as on British ships, unless there be a clause making proof of interest unnecessary, as "interest or no interest," or, "without further proof of interest than the policy," or words of like effect.^g

Averment
of interest.
*1219

By Reg. Gen. Hill. T. 4 W. IV, reg. 5, it is ordered, that in actions on policies of insurance the interest of the assured may be averred thus, "that *A.*, *B.*, *C.*, and *D.*, or some or one of them were or was interested," &c., and it may also be averred "that the insurance was made for the use and benefit, and on the account of the person or persons so interested."^h Before the above rule, the persons in whom the interest was vested must have been described with great accuracy, so that the insurers might know from the declaration who were the interested persons.ⁱ An averment of interest at the time of effect-

^a Robinson v. Tobin, 1 Stark. 336. (3 Eng. C. L. 416.)

^b 2 Ch. Pl. 103. 110. Hughes, 464.

^c Id. Cotterill v. Caff, 4 Taunt. 285.

^d Haughton v. Ewbank, 4 Camp. 88.

^e De Symons v. Shedden, 2 B. & P. 183.

^f De Symons v. Johnston, 2 N. R. 77.

^g Cousins v. Nantes, 3 Taunt. 513. See *ante*, 1133.

^h Reg. Gen. H. T. 4 W. IV.

ⁱ See Cohen v. Hannam, 5 Taunt. 101. (1 Eng. C. L. 26.) Bell v. Ansley; 16 East, 141. Wright v. Welbie, 1 Ch. 49. Millish v. Bell, 15 East, 4. Carruthers v. Shedden, 6 Taunt. 14. (1 Eng. C. L. 293.)

ing the policy is immaterial, and if averred need not be proved; it is sufficient to aver and prove that the interest was vested during the period of the risk.^a

Sailing of the ship.

An averment that the ship sailed on her voyage, is introduced to show a compliance with the policy. But whether the ship sailed before or after the making of the policy is immaterial, as every policy contains the words "lost or not lost." An averment therefore that the ship sailed after, is satisfied by proof that she sailed before the policy was made.^b But where the policy was "at and from," a place, an averment that the ship was lost after she had sailed on her voyage, is not satisfied by proof that she was lost before she sailed.^c

Averment of loss.

The cause of the loss should be correctly stated; it must appear that it was within the terms of the policy.^d If a loss be alleged by the perils of the sea, and it appear to have happened from barratry, the variance will be fatal.^e It is not necessary, "however, to aver the loss in the very words of the

*1220

policy; if the facts alleged come within the meaning of the words, it is sufficient. Thus, an averment that the goods were lost by the fraud and negligence of the master and mariners, is a sufficient allegation of barratry, though the term "barratry," being a well known word of art, is a more correct description.^f If the loss happened through the collusion of the master with the enemy, the loss may be laid by capture or by barratry.^g An averment of the amount of the loss is not material, for a partial loss may be given in evidence under an averment for a total loss. The damages are severable, and the plaintiff may recover *less*, though he cannot recover *more* than those alleged in the declaration.^h So the plaintiff may give in evidence any damage that is within the cause of action as stated, without its being specially averred. Thus, when some of the goods had been spoiled, and some saved, and the declaration alleged that the vessel was sunk, evidence of salvage was held to be admissible.ⁱ When an adjustment has taken place, it need not be declared upon specially, but may be given in evidence as an admission upon the usual declaration, or upon an account stated.^j

Damages.

^a Rhind v. Wilkinson, 2 Taunt. 237.

^b Peppins v. Solomon, 5 T. R. 496. 2 N. R. 308. 6 Taunt. 465. (1 Eng. C. L. 454.)

^c Abitbol v. Bristow, 6 Taunt. 462. (1 Eng. C. L. 454.)

^d 2 Saund. 201. f. 2 Ch. Pl. 106.

^e Hughes, 469; and see Cullen v. Butler, 5 M. & S. 461. Phillips v. Barber, 5 B. & A. 161. (7 Eng. C. L. 55.) Butler v. Wildman, 3 B. & A. 398. (5 Eng. C. L. 324.)

^f Knight v. Cambridge, 2 Lord Raym. 1349. 1 Stra. 581.

^g Arcangelo v. Thompson, 2 Camp. 620. See Hodson v. Malcomb, 2 N. R. 336.

^h Gardiner v. Croasdale, 2 Burr. 904.

ⁱ Carey v. King, Hardw. 304. Hughes, 471. 2 Ch. Pl. 106.

^j Rogers v. Naylor, Park, 194. Christian v. Coombe, 2 Esp. 489. Sherriif v. Potts, 5 Esp. 96.

By Reg. Gen. 4 W. IV, reg. 5, "two counts upon the same policy of insurance are not to be allowed."

But a count upon a policy of insurance, and a count for money had and received, to recover back the premium upon a contract implied by law, are to be allowed.

The account stated may be joined, "and there may be several breaches of the same contract."

Since the new rules, every matter of defence, except a denial of the subscription to the policy by the defendant must be specially pleaded. By Reg. Gen. H. T. 4 W. IV, the plea of non-assumpsit in an action on a policy of insurance will operate "as a denial of the subscription to the alleged policy by the defendant, but not of the interest or the commencement of the *risk of the loss, or of the alleged compliance with warranties." By reg. 3, "unseaworthiness, misrepresentation, concealment, deviation and various other defences must be pleaded." Proof of unseaworthiness, deviation, &c., lies on the insurer or the party pleading it.^b

*1221

As to what may be given in evidence under a plea of *non est factum*, in an action of debt or covenant, see *ante*.^a

SECTION XXIII.

CONSOLIDATION RULE.

In actions on a policy of insurance against several underwriters, the court by consent of the plaintiff, will make a rule on the application of the defendants, which is called the *consolidation* rule, for staying the proceedings in all the actions but one, upon the defendants undertaking to be bound by the verdict in that action, and to pay the amount of their several subscriptions and costs, in case of a verdict for the plaintiff.^d Where the proceedings are not vexatious, the court has no power of compelling the plaintiff to consent to the consolidation rule.^e But if he objects, the court may grant imparlance in all the causes but one, until he does consent.^f On the other hand, if the plaintiff consents, the court will oblige the defendants to submit to reasonable terms, such as admitting the policy and undertaking not to bring a writ of error.^g The verdict referred to by the consolidation rule, means a verdict satisfactory to the court.^h

^a Reg. G. H. T. 4 W. IV.

^b *Franco v. Nalusck*, 1 Tyr. & G. 401.

^c *Ante*, 701.

^d *Tidd*, 665.

^e *Doyle v. Steward*, 4 N. & M. 873. (28 Eng. C. L. 169.)

^f *Brown v. Newnham*, Marsh. 710. ^g *Tidd*, 667.

^h *Hodson v. Richardson*, 3 Burr. 1477.

- Where several causes are consolidated, if a writ of error be issued in the cause tried and execution taken out for want of bail in error being duly put in, execution in those causes is
 *1222 *thereby stayed; for the consolidation rule only relates to the verdict.^a

Where several underwriters to a policy had entered into a consolidation rule, by which they undertook to abide the event of the verdict, and the cause was referred by consent before trial, and the arbitrator awarded the aggregate sum due to the assured from the underwriters at large; the court would not order it to be referred back to the arbitrator to insert the amount of the sum due and payable from each underwriter individually, without the consent of such underwriters.^b

Opening
the conso-
lidation
rule.

The court will not open a consolidation rule unless there be a manifest failure of justice. Where in an action on a policy there had been two verdicts found for the plaintiff, of which the court disapproved; the court refused an application to open the consolidation rule for the purpose of trying another action. Tindal, C. J., observed, that if there was a default of justice, or if the usual facilities were not afforded upon the investigation, or if new evidence had been discovered subsequently to the trial, they might open the rule, but otherwise it was better that there should be an individual hardship, than that a long established rule should be violated.^c But if the court think it reasonable to open a consolidation rule, and try a second cause, they will extend to the second trial all such terms made compulsory on the party successful in the first cause, as are requisite for attaining the merits.^d

The consolidation rule is binding only on the parties who seek the benefit.^e Therefore if the defendant obtains a verdict, the plaintiff may proceed in a second consolidated action; but if he does so without the leave of the court, he will not have the benefit of any of the terms which were imposed on the defendant by the consolidation rule, and the court will restrain the second cause until the costs of the first are paid.^f

- The defendants in several actions on a policy of insurance,
 *1223 *paid money into court, which the plaintiff took out, without taking the costs at that time; afterwards they entered into the common consolidation rule, and the plaintiff was nonsuited in the action that was tried; held, that the latter was not entitled to the costs in any of the actions up to the time of paying the money into court.^g

^a *Aylwin v. Favine*, 2 N. R. 430. See *Gill v. Hinckley*, 1 Moore, 79. (4 Eng. C. L. 387.)

^b *Kynaston v. Liddell*, 8 Moore, 223. (17 Eng. C. L. 104.)

^c *Foster v. Alvery*, MS. T. T. 1837. 3 Bing. N. C. 897. (32 Eng. C. L.)

^d *Cohen v. Bulkeley*, 5 Taunt. 165. (1 Eng. C. L. 52.)

^e *Doyle v. Stewart*, 4 N. & M. 873. (28 Eng. C. L. 169.)

^f *Doyle v. Douglas*, 4 B. & Ad. 544. (24 Eng. C. L. 113.) *Long v. Douglas*, *Id.n.*

^g *Burstall v. Horner*, 7 T. R. 372.

SECTION XXIV.

EVIDENCE.

In an action on a policy of insurance, the plaintiff must prove: 1. The execution of the policy by the defendant. 2. The interest of the insured, and shipment of the goods. 3. The sailing of the ship. 4. The loss and damages, if not admitted by the pleadings. The policy must be produced, properly stamped, and the subscription of the defendant proved. If the subscription be by an agent, the authority of the agent must be proved, which may be done by the agent himself. If there be no direct evidence of such authority, proof of the handwriting of the agent, and that he was in the habit of subscribing policies for the defendant, with his knowledge,^a or that the defendant had paid losses on policies subscribed by the agent, is sufficient, though it appear that the agent was appointed by letter of attorney.^b A letter dated abroad, and addressed to *J. S.*, in England, with the English ship letter post mark upon it, directing a policy to be effected, is sufficient to prove that *J. S.* was the person residing in Great Britain, who received the order for, and effected the policy.^c Parol evidence of what passed at the time of effecting a policy of insurance, is not admissible to restrain the effect of the policy.^d Nor is the slip signed previous to the policy evidence of the insurance.^e But usage is admissible to explain the terms of the policy, but not to add to or vary its stipulations. Thus, evidence is admissible *to show that a port in Friesland is, in mercantile language, a port in the Baltic.^f

Proof of agency.

Evidence in explanation of the policy.

*1224

The interest in the subject matter insured must be proved as laid in the declaration; if it be a ship, evidence of acts of ownership, as loading the ship, paying the persons employed, providing stores, or the like, is presumptive evidence of the plaintiff's title.^g Where the interest is alleged to be in a party who was never in possession of the ship, his title must be proved by the production of the bill of sale, and by proving the ownership of the vendor, and a compliance with the requisites of the registry acts.^h The register is of itself no evidence to prove a transfer by sale; for the objects of the registry acts were alien from those of evidence, but though a certificate of registry is

Proof of the interest of the insured.

The register.

^a Neale v. Irving, 1 Esp. 61.^b Haughton v. Ewbank, 4 Camp. 68.^c Arcangelo v. Thompson, 2 Camp. 260.^d Weston v. Emes, 1 Taunt. 115.^e Rogers v. M'Carthy, 3 Esp. 107.^f Uhde v. Waters, 3 Camp. 16. Gibbon v. Young, 8 Taunt. 261. (4 Eng. C. L. 93.) Parkinson v. Collier, Park, 416.^g Amery v. Rogers, 1 Esp. 207. Thomas v. Fayle, 5 Esp. 88. Abbott, Ship. 72. Robertson v. French, 4 East, 130. Sutton v. Bush, 2 Taunt. 302.^h 6 Geo. IV, c. 110, and 7 Geo. IV, c. 48, s. 25, 26, 27.

not even *prima facie* evidence of a transfer by sale,^a yet in many instances it will negative a transfer by sale, and operate as conclusive evidence of want of title. As where the interest was alleged to be in four, but two only were mentioned as owners in the register; it was held that the action could not be maintained, for want of proof of interest in the four, though they were all partners in trade, and had paid jointly for the ship.^b An averment that *A.* was sole owner of the ship to a certain day, is not disproved by evidence that he executed a bill of sale of part before that day, and that on that day the requisites of the registry acts were complied with.^c Where the ship was purchased in a foreign port, a copy of the bill of sale issued by a public officer authorised to authenticate the original, and to make copies, was held to be evidence of that fact.^d Interest in goods may be proved by evidence of possession by the insured, and of the exercise of acts of ownership, the production of the bill of lading, and the evidence of *the captain of the ship that he had the goods mentioned in it on board, is sufficient.^e

*1225

Bill of lading.

A bill of lading signed by a deceased master of a vessel, for goods to be delivered to a consignee or his assigns, he paying freight, is admissible as evidence of the consignee having an insurable interest in the goods.^f So the production of a bill of parcels from the seller abroad, with the receipt to it, and proof of his handwriting, has been held sufficient.^g So the bill of lading is evidence of the property in the goods, on proof of the master's signature, though he be alive; but it is not evidence of the shipment.^h

Shipment of the goods.

Where the policy is on freight, the insured must prove that, but for the intervention of the perils of the sea insured against, some freight would have been earned, either by showing that some goods were put on board, or that there was an inception of the right to freight under the charterparty, or some other express or implied contract.ⁱ The loss accruing by reason of

^a *Pirie v. Anderson*, 4 Taunt. 659. *Flower v. Young*, 3 Camp. 240.

^b *Camden v. Anderson*, 5 T. R. 709. *Westerdale v. Dale*, 7 T. R. 306. But see *Dawson v. Leake*, 1 D. & B. 52.

^c *Ritchie v. St. Barbe*, 4 Taunt. 768.

^d *Woodward v. Larking*, 3 Esp. 286.

^e *M'Andrew v. Bell*, 1 Esp. 473.

^f *Haddow v. Parry*, 3 Taunt. 303. But if the master guards his acknowledgement by saying "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading alone is not evidence, either of the quantity of the goods, or of property in the consignee. *Id.* By 6 Geo. IV, c. 94, s. 2, "any person entrusted with, and in possession of, any bill of lading, dock warrant, &c., or warrant or order for the delivery of goods, shall be deemed and taken to be the true owner of the goods, so as to give validity to any contract for the sale of the goods, or any deposit or pledge, provided there be no notice by the documents themselves that the person entrusted as aforesaid was not the actual owner."

^g *Russell v. Bocken*, 2 Stra. 1127.

^h *Dickson v. Lodge*, 1 Stark. 226. (11 Eng. C. L. 367.)

ⁱ *Davidson v. Willasey*, 1 M. & S. 313. *Flint v. Flemyang*, 1 B. & Ad. 45. (20 Eng. C. L. 340.)

the insured being deprived of the means of carrying his own goods in his own ship, is recoverable under such a policy.^a

Where the vessel is lost, there must be evidence of her sailing on the voyage stated in the policy;^b proof of a particular destination by a charterparty, or of her clearing out for a particular port, or of a license for the port mentioned in the policy, will be *prima facie* evidence of her sailing on the voyage insured after she dropped from her moorings.^c

Sailing on the voyage.

To prove a warranty, that a ship insured was of a particular nation, it is *prima facie* evidence, that she carried the flag of that nation at times when she was free from all danger of capture, and that the captain addressed himself to the consul of that nation in a foreign port.^d

*1226
Compliance with warranties

If the warranty be to sail with convoy, compliance will be presumed, if a convoy was required by law.^e The log-book, or the official letter of the commander of the convoy, is evidence of the ship sailing with a convoy.^f When it is necessary to prove a license, the original document must be produced, if in existence, but if lost, secondary evidence of it will be admitted, which may be an examined copy, or if there be none, parol testimony.^g

The proof of the loss must correspond with the averments in the declaration. We have seen that in case of a ship's not having been heard of for a considerable time, a loss may be presumed.^h Where a loss is to be inferred from the want of intelligence, the plaintiff must distinctly prove that, when the vessel left the port of outfit, she was bound upon the voyage insured.ⁱ Where the plaintiff's agent showed to the defendant, an underwriter, the captain's protest, containing an account of the loss of the ship insured, demanding payment; held, that this did not entitle the defendant to read the protest in evidence in an action on the policy.^j

Proof of the loss.

In case of a capture, the entry in Lloyd's books, stating the capture, is evidence of the fact, as against a subscriber to Lloyd's.^k We have already seen that the condemnation of the property insured as enemy's property by the sentence of a court of admiralty, is conclusive evidence against the warranty of neutrality,^l with respect to the amount of the loss. In open policies the insured must prove the amount of his loss, but in

Loss by capture.

^a Per Bayley, J., 1 B. & Ad. 49. (20 Eng. C. L. 340.)

^b *Koster v. Innes*, R. & M. 336. (21 Eng. C. L. 450.)

^c *Cohen v. Hinckley*, 2 Camp. 52. *Marshall v. Parker*, *Id.* 69.

^d *Arcangelo v. Thompson*, 2 Camp. 620.

^e *Thornton v. Lane*, 4 Camp. 231.

^f *D'Israeli v. Jowett*, 1 Esp. 427. *Watson v. King*, 4 Camp. 275.

^g 2 Stark. Ev. 640. *Kensington v. Inglis*, 8 East, 273. *Rhind v. Wilkinson*, 2 Taunt. 243. *Eyre v. Palsgrave*, 2 Camp. 606.

^h See *ante*, 1156.

ⁱ *Koster v. Jones*, R. & M. 333. (21 Eng. C. L. 450.)

^j *Senat v. Porter*, 7 T. R. 158.

^k *Abel v. Potts*, 3 Esp. 242.

^l *Ante*, 1188.

*valued policies, if the loss be a total one, he need only prove that he had some interest: if partial only, he must show the amount of his loss, as in an open policy.^a Payment into court of a per centage on a valued policy, does not admit a total loss.^b

Amount of loss. The certificate of an agent for Lloyd's at a foreign port, ascertaining an average loss on a cargo damaged by sea water, is not of itself admissible evidence as to the amount of the loss, in an action by the assured against the underwriters in this country.^c

The evidence required on behalf of the defendant, must depend on the nature of the defence.

Who may be a witness. An underwriter is a competent witness for another underwriter who has subscribed the same policy;^d unless he has entered into the consolidation rule, or has paid the amount of the loss on condition of being repaid, if the policy turned

The owner. out to be invalid.^e An owner of a ship is not a good witness (in an action on an insurance of goods put on board that ship) to prove her seaworthy until released by the plaintiff.^f In an action on a policy of insurance on goods from London to Emden, where the ship was lost by putting into the Texel; the captain, as part owner of the ship, was admitted as a competent witness to prove that the ship originally sailed on the voyage insured by the direction of the owners of the goods, though not to prove that the deviation was justified by necessity.^g But the captain of a ship is not an admissible witness to disprove barratry, by showing that the barratrous acts were done by consent and direction of the owners, without a release from the underwriters.^h Depositions taken in an action on a policy of insurance of the captain, who is also part owner, where the loss is imputed to his misconduct, are not evidence.ⁱ Nor is the captain's protest evidence of the fact therein stated,^j though it may be read for the purpose of contradicting his testimony.^j

The captain.

*1228

One who is jointly interested in the property, is incompetent to give evidence.^k But in an action on a policy for goods, the supercargo, who was to have had a share in the profits of the adventure, is a good witness where the goods were lost before they were sold,^l and the broker who effected the policy, and has a lien upon it for his premium, is a competent witness to prove all matters connected with the policy.^m Upon a question

^a 2 Saund. 201. See *ante*, 1252.

^b Rucker v. Palegrave, 1 Taunt. 419.

^c Drake v. Marryatt, 2 D. & R. 696. 1 B. & C. 473. (8 Eng. C. L. 137.)

^d Burt v. Baker, 3 T. R. 27. Akers v. Thornton, 1 Esp. 414.

^e Forrester v. Pigou, 3 Camp. 380. 1 M. & S. 14.

^f Rotheroe v. Elton, Peake, 84, n. Fox v. Lushington, Peake, 85, n.

^g De Symonds v. De la Cour, 2 N. R. 374.

^h Bird v. Thompson, 1 Esp. 339. Taylor v. M'Vicar, 6 Esp. 27.

ⁱ Senat v. Porter, 7 T. R. 158. Christian v. Coombe, 2 Esp. 490.

^k De Symmonds v. Shedden, 2 B. & P. 155.

^l Robertson v. French, 4 Esp. 246. 4 East, 130.

^m Hunter v. Leathley, 10 B. & C. 858. (21 Eng. C. L. 184.)

concerning the seaworthiness of a ship, after the evidence of persons who have been examined as to her condition, experienced shipwrights who never saw her may be called to say whether, upon the facts sworn to, she was in their opinion seaworthy or not.*

SECTION XXV.

INSURANCE UPON LIVES.

AN insurance upon life is a contract by which the insurer, in consideration of a certain premium, agrees to pay a stipulated sum, or an annuity upon the death of the party whose life is insured, whenever that event shall take place, if the insurance be for the whole life; or in case it should happen within a certain fixed period, if the insurance be for a limited time. This species of insurance is often resorted to as a means of making a provision for a family, after the death of the party whose life is insured; and also as a security for the repayment of a loan; a life policy is assignable and may be effected either by the party himself or by a third person, but to prevent life insurance from being converted into a medium of mischievous speculation, it was enacted by 14 Geo. III, c. 48, s. 1, "that no insurance should be made by any person, body politic or corporate, on *lives, or on any other event, wherein the person for whose benefit, or on whose account the policy is made, has no interest, or by way of gaming or wagering; and every insurance made, contrary to the true intent and meaning thereof, should be void to all intents and purposes." Sec. 2. "That in every policy on lives or other events, the name of the person interested, or on whose account it is made, should be inserted." Sec. 3. "That no greater sum should be recovered, or received from the insurer, than the amount of the interest of the insured." Sec. 4, contains a proviso "that this act shall not extend to marine insurance."

Gaming or
wagering
policies
are illegal.
*1229

In order to render a policy valid, within the meaning of this act, the party for whose benefit it is effected must have a *pecuniary* interest in the life or event insured; therefore, a policy effected by a father on the life of his son, he not having a pecuniary interest therein, has been held to be void.^b But "if a father, wishing to give his son some property to dispose of, make an insurance on his son's life, in the son's name, not for the father's own profit, but for the benefit of the son, there is no law to prevent his doing so."^c

The party
for whose
benefit the
insurance
is effected
must have
a *pecuniary*
interest in the
life insured.

* Bickwith v. Sydebotham, 1 Camp. 117. Thornton v. Royal Exchange Assurance Company, Peake, 25.

^b Halford v. Kymer, 10 B. & C. 724. (21 Eng. C. L. 155.)

^c Per Bayley, J., *id.* 729.

A creditor may insure the life of his debtor.

A creditor has an insurable interest in the life of his debtor, for the means whereby he is to be satisfied, may materially depend on it; and the death must, at all events, in some degree lessen his security.^a But though a creditor may insure the life of his debtor to the extent of his debt, yet such a contract is substantially a contract of indemnity against the loss of the debt; and therefore, if, after the death of the debtor, his executors pay the debt to such insuring creditor, the latter cannot afterwards recover upon the policy, although the debtor died insolvent, and the executors were furnished with the means of payment by a third party; it being immaterial from what fund the debt has been discharged so as the creditor has received satisfaction.^b So where the debt accrues by virtue of an illegal security, as a note for money won at play, such interest is not insurable.^c

*1230

* An executor, in trust, has a sufficient interest to entitle him to make insurance in his own name on the life of a person who granted an annuity to the testator.^d Whether a party may insure his own life as the agent, with the funds and for the benefit of another, seems to admit of some doubt.^e

Declaration respecting age, health, &c

In effecting an insurance, it is usual for the party to subscribe a written declaration, touching his age, health, &c., which is incorporated by reference in the policy, at the end of which a proviso is usually inserted, avoiding the policy, if the declaration contains any averment that is not true, or if the insured is afflicted with any disorder which has a tendency to shorten human life. It is not to be concluded that a disorder with which a person is afflicted before he effects an insurance on his life, is "a disorder tending to shorten life," from the mere circumstance that he afterwards dies of it, if it be not a disorder which generally has that tendency.^f Where a policy contained a warranty that the insured had not been afflicted with nor was subject to gout, vertigo, *fits*, &c.; it was held, that the fact of the insured having had an epileptic fit, in consequence of an accident, was not a falsification of the warranty. To vacate such a policy, it must be shown that the assured was naturally liable to fits, or by accident or otherwise had become so liable.^g

An untrue statement, though unintentionally made, will

By a declaration and statement as to health, &c., signed by the assured previous to effecting a policy on a life, it was agreed, that if any untrue averment was contained therein, or if the facts required to be set forth in the proposal (annexed) were not truly stated, the premiums should be forfeited, and

^a *Anderson v. Edie*, Park, 640. *Lindenau v. Desborough*, 3 C. & P. 353. (14 Eng. C. L. 343.) 8 B. & C. 586. (15 Eng. C. L. 306.)

^b *Godsall v. Boldero*, 9 East, 72. ^c *Dwyer v. Edie*, Park, 639.

^d *Tidswell v. Ankerstein*, Peake, 151..

^e *Wainwright v. Bland*, 1 Gale, 406. 1 Mees. & Wels. 39.

^f *Watson v. Mainwaring*, 4 Taunt. 763. Being troubled with spasms, cramps, and violent fits of the gout, does not falsify a warranty of good health. *Willis v. Poole*, Marsh. 649.

^g *Chattock v. Shawe*, 1 M. & Rob. 498.

the assurance be absolutely null and void; the statement as to the health of the life was untrue in point of fact, but not to the knowledge of the party making it; held, that the premiums were forfeited, and could not be recovered back; for the statement was not the less untrue because the party making it was not apprized of its untruth.^a

*Where an insurance was effected on the life of *A.* for the benefit of *B.*, and the insurance office acted upon *A.*'s own representation as to the state of his health, and it turned out that he was not an insurable life; held, that *B.* could not maintain an action on the policy, although he was not privy to the representation;^b for in an insurance upon the life of another, the life insured, if applied to for information, is, in giving such information, impliedly the agent of the party insuring, who is bound by his statements, and must suffer if they are false, although he is unacquainted with the life of the insured. As where the plaintiff in effecting an insurance on the life of *B.*, with whom he was unacquainted, desired the agent of the insurance office to do all that was requisite; the agent knew *B.* well and made the usual inquiries; one of the terms of the contract was a reference to the usual medical attendant of the life insured; *B.* having given a false reference, it was held that he, plaintiff, could not recover.^c

avoid the policy.

*1231
The party insuring is bound by the statement of the life insured.

A material concealment will avoid the policy.

If the insured, at the time of effecting the policy, conceals anything which the insurer ought to know, the policy is void, whether the insured considered it material or not; what amounts to a misrepresentation or material concealment is a question for the jury.^d A female upon whose life it was proposed to effect an insurance, was represented to the insurers, in December, 1822, by *A.*, a medical man, as enjoying, ordinarily, a good state of health; the same representation was repeated by *A.* in March, and the insurance was effected in April, 1823; between December, 1822, and March, 1823, she had been ill with a pulmonary attack, and was attended by *B.*, but no disclosure of these circumstances was made to the insurers; in April, 1824, she died of a pulmonary disease; held, that the jury ought to have been called on to consider whether the illness in 1823, and the attendance of *B.* ought to have been disclosed to the insurers; and that it was not sufficient to direct them, generally, to consider *whether or not there had been any misrepresentation.^e So where the insured was represented as resident at Fisherton Anger; and the fact was, that she was then a prisoner in the county gaol there; held, that it was a

*1232

^a Duckett v. Williams, 3 C. & M. 348. 4 Tyr. 240.

^b Maynard v. Rhodes, 5 D. & R. 266. 1 C. & P. 360. (11 Eng. C. L. 418.)

^c Everett v. Desborough, 5 Bing. 503. (15 Eng. C. L. 518.) 3 M. & P. 190.

^d Lindenau v. Desborough, 8 B. & C. 586. (15 Eng. C. L. 306.) 3 M. & R. 45.

Wainwright v. Bland, 1 Gale, 406. 1 Mees. & Wels. 32.

^e Morrison v. Muspratt, 4 Bing. 60. (13 Eng. C. L. 341.) 12 Moore, 231.

question for the jury whether the imprisonment was a material fact, and ought to have been communicated.^a

A policy of insurance on the life of another person, who at the time of the insurance is in a good state of health, is not vitiated by the non-communication of such person of the fact of his having a few years before been afflicted with a disorder tending to shorten life, if the disorder was of such a character as to prevent the party from being conscious of what had happened to him while suffering under it.^b Where a party about to insure her life for a limited period, gave false answers to verbal inquiries respecting the amount of her insurances at other offices, and the jury found, that she thereby suppressed a material fact; the court held, that the policy was void.^c On an insurance on a man's life for a year, if some short time before the expiration of the term he receives a mortal wound, of which he dies after the year, the insurer will not be liable.^d

Where an insurance is made upon a man's life who goes to sea, and the ship in which he sailed is never afterwards heard of, the question whether he did or did not die within the term insured, is a fact for the jury to ascertain from the circumstances which shall be produced in evidence before them.^e Though the policy contains no exception as to death by the hands of justice, yet if it be effected by a party on his own life, and he suffer death for felony, the policy is void as to those claiming under him, and in his right.^f The conditions annexed to a policy must be strictly performed.^g If after the death of the life insured, the sum due on the policy be paid, and the insurer afterwards discovers that the policy was void on the ground of fraud, he may recover it back in an action for money paid.^h

*1233

SECTION XXVI.

INSURANCE AGAINST FIRE.

AN insurance against fire is a contract by which the insurer, in consideration of a certain premium received by him, either in a gross sum, or by annual payments, undertakes to indemnify the insured against all loss or damage which he may sustain in his house or other buildings, goods, merchandise, &c.,

^a *Huguenin v. Rayley*, 6 Taunt. 186. (4 Eng. C. L. 351.)

^b *Swete v. Fairlie*, 6 C. & P. 1. (25 Eng. C. L. 249.)

^c *Wainwright v. Bland*, 1 Mees. & Wils. 32. 1 Gale 406.

^d *Lockyer v. Offley*, 1 T. R. 260. ^e *Patterson v. Black, Park*, 644.

^f *Amicable Society v. Bolland*, 2 Dow. & Clarke, 1. 4 Bligh N. S. 194.

^g See *Want v. Blunt*, 12 East, 183.

^h *Lefevre v. Boyle*, 3 B. & Ad. 877. (23 Eng. C. L. 207.)

by fire, during a limited period of time.^a A policy of this kind is not in its nature assignable, nor can the interest in it be transferred from one person to another, *without the consent of the office*; therefore where a policy was transferred to the purchaser of a house thereby insured, and the house was afterwards burnt; it was held, that he could not recover on the policy.^b This species of policy falls within the 14 G. III, c. 48,^c consequently the insured must have an interest in the property insured.

Not assignable.

A misrepresentation or concealment of material facts will avoid a fire policy, in the same manner as other policies.⁽¹⁾ Where *A.*, abroad, having two warehouses, wrote to this country to effect an insurance upon one of them only, without stating, as was the fact, that a house nearly adjoining it had been on fire on that evening, and that there was danger of the fire again breaking out; and sent his letter after the regular post time; the fire having again broken out on the day next but one following, and consumed *A.*'s warehouse; held, that this was a material concealment, although *A.*'s letter was written without any fraudulent intention.^d Where a mill was insured as being of one class and turned out to have been of another, at the time it was insured; held, that the policy was void, for "the building was not *de facto* that which was insured."^e But where an agricultural building was described in a policy as a barn, though it was not strictly so; held, not to be such a misdescription as would vacate the policy, as the building, had it been rather more correctly described, would have paid the same rate of insurance.^f

Misrepresentation or concealment.

*1234

Where goods insured were described in the policy to be in the dwelling-house of the insured, and it appeared that he had only one room as a lodger, in which the goods were; it was held, that they were correctly described within the condition, that "houses, buildings, or other places, where goods are deposited, shall be truly described," such condition relating to the construction of the house, and not to the interest of the parties in it.^g

If a policy refer to certain printed proposals, the proposals will be considered as part of the contract. By the printed proposals of a fire insurance company it was stipulated, "that the insured should procure a certificate of the minister, and some respectable housekeepers of the parish importing that they knew the character of the insured," &c.; it was held, that the

Condition precedent to the right to recover.

^a Marsh. 787. Hughes, 505.

^b Lynch v. Dalzell, 4 Bro. P. C. 431.

^c *Ante*, 1228.

^d Bufe v. Turner, 2 Marsh 46. 6 Taunt. 338. (1 Eng. C. L. 406.)

^e Newcastle Fire Assurance Company v. Macmorran, 3 Dow. 255.

^f Dodson v. Southby, M. & M. 90. (22 Eng. C. L. 260.)

^g Friedlander v. London Assurance Company, 1 N. & M. 31.

(1) *Jefferson v. Cotheal*, 7 Wend. 72. *Delonquemare v. Tradesmen's Ins. Co.*, 2 Hall, 589. *Stebbins v. The Globe Ins. Co.*, Ibid. 632. *Columbia Ins. Co. v. Lawrence*, 10 Peters, 507.)

procuring such certificate was a condition precedent to the right of the insured to recover; and that it was immaterial that the minister, &c., had wrongfully refused to grant such certificate, the rule being, that if a person undertake for the act of a stranger, that act must be done.^a

When the period for which the insurance was effected has expired, the benefit of the policy is forfeit-

*1235 ed though it contains a stipulation that it may be renewed within a specific time afterwards, and though an offer has been made to renew it within such time.

Where by a policy under seal, referring to certain printed proposals, a fire office insured the defendant's premises from 11th of November, 1802, to 25th December, 1803, for a certain premium which was to be paid yearly on each 25th of December, and the insurance was to continue so long as the insured should pay the premium at the said times, and the office should agree to accept it. By the printed proposals it was stipulated that the insured should make all future payments annually at the office, within fifteen days after the day limited by the policy upon forfeiture of the benefit thereof, and that no insurance was to take place till the premium was paid; and by a subsequent advertisement (agreed to be taken as part of the policy) the office engaged that all persons insured there, by policies for a year or more, had been and should be considered as insured for fifteen days beyond the time of the expiration of their policies; it was held, notwithstanding this latter clause, (the insured having, before the expiration of the year, had notice from the office to pay an increased premium for the year ensuing, or otherwise they would not continue the insurance, and the insured having refused to pay such advanced premium,) that the office was not liable for a loss which happened within fifteen days from the expiration of the year for which the insurance was made; though the insured, after the loss, and before the fifteen days expired, tendered the full premium which had been demanded; for the effect of the whole contract, &c., taken together, was only to give the insured an option to continue the insurance or not, during fifteen days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding any intervening loss, provided the office had not before the end of the year, determined the option, by giving notice that they would not renew the contract.^{b(1)}

So where in a policy of insurance against loss by fire, from half

^a Worsley v. Wood, (in Error,) 6 T. R. 710. 2 H. Bl. 574. And see Oldman v. Bewicke, 2 H. Bl. 577, n. Routledge v. Burrell, 1 H. Bl. 254.

^b Salwin v. James, 6 East, 571. See Doe d. Pitt v. Shewin, 3 Camp. 134.

(1) (A policy, executed by the defendants, a corporation under their seal for the term of one year contained a clause that persons desirous of continuing their insurances, might do so by a timely payment of the premium without being subject to any charge for the policy. The insurance was accordingly continued from year to year by endorsements on the policy, which were not under seal: held, that these endorsements did not continue the instrument as a specialty: and, therefore, that the action of covenant would not lie to recover for a loss incurred after the expiration of the first term. *Luciani v. American Fire Ins. Co.*, 2 Wharton, 167. The plaintiff might have demanded a policy in conformity with the clause, and have maintained an action for the breach of it; or he might, perhaps, maintain *assumpsit* on the contract remaining in parol. Per Gibson, C. J., *Ibid.*)

a year to half a year, the assured agreed to pay the premium half yearly, "as long as the insurers should agree to accept the same," within fifteen days after the expiration of the former half-year; and it was also stipulated that no insurance should take place till the premium was actually paid; a loss happened within fifteen days after the end of one half year, but before the premium for the next was paid; it was held, that the insurers were not liable, though the assured tendered the premium before the end of the fifteen days, but after the loss; for the policy was at an end after the expiration of the half year; and by the terms of the contract, the insurers had an option to accept or refuse the premium after that period, and the insurance was not to take place until the premium was actually paid.*

*1236

Where there was a condition in the policy that the insured should forfeit all benefit under it, if there were any fraud or false swearing in the claim he should make in case of a loss. A fire having ensued, the insured made an affidavit of the damage to the extent of 1085*l.*; in an action on the policy the jury having found a verdict for the insured with 500*l.* damages only, the court granted a new trial.^b

A policy of insurance on a mill, millwright's work, standing Recital in and going gear, engine house and steam-engine, recited "that a policy. the aforesaid buildings were brick built, warmed by steam, lighted by gas, and worked by the steam-engine above mentioned, in tenure of one firm, standing apart from all other mills, and worked by day only." In an action of covenant to recover the amount of a loss by fire; held, that the recital did not mean that the steam engine was not worked by night. A condition was indorsed on the policy avoiding it, if after the insurance was effected, the risk should be increased by the erection or alteration of any stove, or the carrying on any hazardous trade, &c. The defendant pleaded, that after the making of the policy the said steam engine was worked by night, and not by day only, whereby the risk was increased; held, that the plaintiff was entitled to judgment, notwithstanding a verdict for the defendant on this plea, it being bad in omitting to state that the engine was not worked in the same way before the time of the effecting of the policy.^c

Where a policy contained a condition "that the insured should forfeit all right to recover on it, unless the buildings insured were accurately described, and the trades carried on there specified, that they might be classed at appropriate rates of payment; and secondly, that if any alteration was made in any building insured, or if the risk was increased, it should be

Construction of conditions in policies against fire.

* *Tarleton v. Staniforth*, 5 T. R. 695. As to the construction of policies, see *Andrews v. Ellison*, 6 Moore, 199. (17 Eng. C. L. 24.) *Severne v. Olive*, *id.* 335. *Alehone v. Saville*, *id.* 202, n. (17 Eng. C. L. 26.)

^b *Levy v. Baillie*, 7 Bing. 349. (20 Eng. C. L. 157.) 5 M. & P. 208.

^c *Whitehead v. Price*, 1 Gale, 151. 2 C. M. & R. 447.

- notified to the insurers, and allowed by indorsement on the *policy." In an action on the policy, it appeared that the subject of insurance was a kiln, which had been never used for any other purpose than drying corn and seed, until after the insurance, and that the loss occurred in consequence of it being lent, without any remuneration to the insured, on one occasion, for drying bark, which was a more hazardous use; it also appeared that a higher premium was exacted by insurers for a bark kiln than for a malt kiln. It was contended, on behalf of the insurance office, that the policy was void on two grounds; first, because the kiln was described in the policy as for drying *corn*, whereas it was used for drying *bark*, whereby the first condition above stated, was violated; secondly, because there was a change made in the business and risk without notice to the office, as required by the second condition; but the court overruled both objections, and decided that the insured was entitled to recover on the policy. In answer to the first objection the court said, that the condition pointed to the description of the premises given at the time of insuring, and that description being in this instance perfectly correct, nothing which occurred afterwards, not even a change of business, could bring the case within that condition, which was fully performed when the risk first attached. As to the 2d objection, they said, that the condition referred to pointed at an alteration of business, as something permanent and habitual; and that a single act of bark drying did not amount to a breach of that condition. That no clause in the policy amounted to an express warranty that nothing but corn should ever be dried in the kiln, and there were no facts or rule of legal construction from which an implied warranty could be raised.^a So where the premises insured were described in the policy as a building "where no fire was kept, and no hazardous goods deposited;" it was held, by Lord Tenterden, that these words meant the habitual use of fire, and deposit of hazardous goods, and that the insured was not precluded *from recovering on the policy, where the loss occurred in consequence of making a fire and bringing a tar-barrel on the premises to repair them.^b

*1238 **Losses for which the insurer is not liable.** If a person who is not a linendraper, insures his "stock in trade, household furniture, linen, wearing apparel, and plate," by a policy against fire, this will not protect linendrapery goods subsequently purchased on speculation; and the word "linen" in the policy must be confined to household linen by way of apparel.^c Where an innkeeper insured his "interest in the inn and offices," it was held, that on the inn being burnt, he could not recover against the insurer the loss sustained by his hiring

^a Shaw v. Robberds, 1 N. & Per. 379. 1 W. W. & Dav. 94. It was also held, in this case, that the negligence of the insured himself in drying the bark, in the absence of fraud, was no defence to the action.

^b Dobson v. Southby, M. & M. 90, (22 Eng. C. L. 260,) *ante*, 1234.

^c Watchorn v. Langford, 3 Camp. 422.

other premises while his own were being repaired, and by the refusal of persons to go to the inn while under repair, the premises having been reinstated by the insurers; for though the profits of an inn might be a subject of insurance, if insured *qua* profits, they could not be considered as an incidental part of the loss under an insurance upon a house or shop.^a

A policy was effected against "loss or damage by fire," on the stock of a sugar-house, the different stories of which were heated by a chimney running up to the top. The insured negligently lighted the fire, without opening the register at the top, by which means the heat was increased to such a degree as to spoil the sugar, but no ignition was produced; held, that this was not a loss within the policy.^b The burning of a house by a mob; held, not to be within the proviso of a policy, which provides that the insurers shall not be liable in case the same be burnt by reason of any invasion, foreign enemies, or any military or usurped power.^c But where the policy contained a proviso, that the insurers should not be liable for a loss occasioned by "civil commotion;" it was held, that they were not liable for losses sustained through the conduct of the mob during the riots in London in the year 1780.^d *1239

Where, in an action against an insurance company to recover a loss sustained by fire, the defence was, that the plaintiff had wilfully set fire to the premises, and the judge directed the jury, that in order to find a verdict against the plaintiff, they should be satisfied that the crime imputed to him was as fully and satisfactorily proved as would warrant them in finding him guilty on a criminal charge for the same offence; held, that such direction was right.^e(1)

^a In the matter of Wright and Poole, 1 Ad. & Ell. 621. (26 Eng. C. L. 167.) S. C. *nom. in re* Sun Fire Office, 3 N. & M. 819. (28 Eng. C. L. 421.)

^b Austin v. Drew, 2 Marsh. 130. 6 Taunt. 436. (1 Eng. C. L. 441.) 4 Camp. 360.

^c Drinkwater v. London Assurance Company, 2 Wils. 363. An insurance company who have paid a loss occasioned by riot, may sue the hundred upon the Riot Act in the name of the insured. Mason v. Sainsbury, Marsh. 796.

^d Landale v. Mason, Marsh. 793.

^e Thurtell v. Beaumont, 8 Moore, 612. 1 Bing. 339. (8 Eng. C. L. 337.)

(1) (As to what is an insurable interest in a policy against fire, see *McGivney v. Phoenix Fire Ins. Co.*, 1 Wend. 85. *Jefferson v. Cothel*, 7 Wend. 72. *Tradesmen's Ins. Co. v. Robert*, 9 Wend. 404. *Tyler v. Aetna Fire Ins. Co.*, 12 Wend. 507. *Laureat v. Chatham Fire Ins. Co.*, 1 Hall, 41. *De Forest v. The Fulton Fire Ins. Co.*, 1 Hall, 84. *Strong v. The Manufacturers' Ins. Co.*, 10 Pick. 40.)

*CHAPTER XVII.

LIMITATIONS, STATUTES OF.

	PAGE
I. The 21 Jac. I. c. 16.	
II. To what cases the statute extends.	1241
III. When it begins to run.	1243
IV. Avoiding it by issuing process.	1251
V. What acknowledgment will avoid it.	1253
VI. The 9 G. IV, c. 14. (Lord Tenterden's Act.)	1256
VII. What promise or acknowledgment will obviate this statute.	1258
VIII. Effect of payment on account.	1265
IX. Payment by one of several debtors.	1266
X. What amounts to payment.	1270
XI. By and to whom the promise or acknowledgment must be made.	1271
XII. The pleadings.	1273
XIII. Evidence.	1273
XIV. Limitations of actions relating to real property. . . .	1273
XV. Limitations of actions on specialties.	1284

SECTION I.

THE 21 JAC. I. C. 16.

By the 21 Jac. I, c. 16, sec. 3, "all actions of trespass, of assault, battery, wounding, imprisonment, or any of them, shall be commenced and sued within *four* years next after the cause of such actions or suits, and not after; and all actions upon the case for *words*, within *two* years next after the words spoken, and not after; and all actions of trespass, detinue, trover, or replevin for goods; all actions of account, and on the case, other than actions concerning trade between merchants; and all actions of debt, grounded on any lending or contracts *without specialty*; and all actions of debt for arrearages of rent, within *six* years next after the cause of such actions or suit, and not after."

*1241

*By sec. 4, "after reversal of judgment for plaintiff in error, or arrest of judgment, or reversal of outlawry, the plaintiff, his heirs, executors, or administrators may commence a new action within a year."

By sec. 7, "if any persons entitled to sue, be within the age of twenty-one years; *feme covert*, non compos mentis, imprisoned or beyond seas at the time the cause of action accrued, they may sue within the time limited after their coming of age, being discovert, of sane memory, at large, or returned from beyond the seas, as other persons having no such impediment might have done."

SECTION II.

TO WHAT CASES THE STATUTE EXTENDS.

THIS statute extends to all actions upon an unsealed, written, or parol contract for the recovery of a debt or damages, whether the claim be made in a court of law or equity.^a It extends to an action on a bill of exchange;^b or by an attorney for his fees.^c It extends to defences of set-off, as well as to actions, and if a debt barred by the statute be set-off, the plaintiff may reply the statute.^d(1)

The statute does not destroy the debt, it only bars the remedy; therefore if the creditor possesses property of the debtor, on which he has a lien, he may enforce his lien, though the demand in respect of which it arises is barred by the statute.^e(2) A debt barred by the statute will not support a commission of bankruptcy; nor can it be proved under it.^f But *if the six *1242 years have not elapsed before the *fiat* was issued, the creditor's claim is not barred; for the statute does not run in that case.^g The king not being named in the statute, is not barred thereby.^h

The statute is a good defence to an action by a landlord for rent against one who had once been his tenant from year to year, but who had not within the last six years occupied the premises, paid rent, or done any act from which a tenancy could be inferred, although the tenancy had not been determined by a notice to quit.ⁱ

^a Bac. Ab. Limitations of Actions, D. 2-4. Though assumpsit is not specifically mentioned in the act, yet it is comprehended in action on the case. *Battley v. Faulkner*, 3 B. & A. 294. (5 Eng. C. L. 268.) 2 Saund. 181. Even though the action be for unliquidated damages. *Pigott v. Rush*, 6 N. & M. 376. 2 H. & W. 28.

^b *Renew v. Axton*, Carth. 3.

^c *Oliver v. Thomas*, 3 Lev. 367.

^d B. N. P. 180.

^e *Higgins v. Scott*, 2 B. & Ad. 413. (22 Eng. C. L. 113.) *Spears v. Hartley*, 3 Esp. 81. But it is no bar in case of fraud. *Ex parte Botton*, 1 Mon. & Ayr. 60.

^f *Ex parte Dewdney*, 15 Ves. 479. *Ex parte Roffey*, 2 Rose, 245. 19 Ves. 468. But a promissory note more than six years old is a good petitioning creditor's debt, as against a stranger, if the *bankrupt* does not object that it is barred by the statute. *Swayne v. Wallinger*, 2 Stra. 746. *Quantock v. England*, 5 Burr. 2628. *Chapple v. Dunstan*, 1 C. & J. 1.

^g *Ex parte Ross*, 2 Glynn & Jam. 461. ^h *Lambert v. Taylor*, 6 D. & R. 188.

ⁱ *Leigh v. Thornton*, 1 B. & A. 625. *Hughes v. Thomas*, 13 East, 474. See 3 & 4 W. IV, c. 27, s. 42, *post*.

(1) (*Alsop v. Nichols*, 9 Conn. 359.)

(2) (The redemption of a pawn is not affected by the statute of limitations, which runs only from the conversion of the thing pawned; but a simple contract debt is not protected from the statute, because accompanied with a pledge as collateral security. *Slaymaker v. Wilson*, 1 Penna. Rep. 216. Where, however, the security for a debt is a lien on property, personal or real, that lien is not impaired, in consequence of the debt's being barred, by the statute of limitations. *Beltmap v. Gleason*, 10 Conn. 180.)

SECTION III.

WHEN THE STATUTE BEGINS TO RUN.

	PAGE		PAGE
1. In cases of torts and contracts.		3. When any of the parties is abroad.	1947
2. Bills and notes.	1246	4. Merchants' accounts.	1949

The statute begins to run from the time that the cause of action accrued.

1.—*In cases of torts and contracts.*] THE statute begins to run from the time that the right of action has accrued; that is, from the day on which the plaintiff might have an action for the recovery of his demand, although the plaintiff may not then know that he has a cause of action, provided no fraud be practised by the defendant, to prevent him from obtaining knowledge of his right of action;(1) therefore, it has been held that the statute was a bar to an action of trover, commenced more than six years after the conversion, although the plaintiff did not know of the conversion until a period within the six years.^a

*1243 So in an action of *assumpsit*, for not laying out the plaintiff's money in an annuity on a good and sufficient security, which the defendant promised to do; held, that the statute of limitations was a good bar to the plaintiff's recovery, as the promise of the defendant was the gist of the action, although it was commenced within the period of six years from the time it was discovered that the security was invalid, and the defendant knew it to be so at the time the annuity was granted.^b So where a declaration in *assumpsit* against an attorney, assigned for breach that he did not make diligent inquiry at the Bank, to ascertain whether stock was standing in the names of certain persons there; held, that the cause of action arose on the breach of duty by the defendant, and not on its discovery by the plaintiff, and that the statute began to run from the time of the breach.^c So, in an action on the case for negligence, where the declaration alleged a breach of duty, and a special consequential damage, it was held that the cause of action was the breach of duty, and not the consequential damage; and that the statute of limitations began to run from the time when the breach of duty was committed, and not from the time when the consequential damage accrued.^d

^a Granger v. George, 5 B. & C. 149. (11 Eng. C. L. 185.) But to support a plea of the statute of limitation, the defendant must show an *actual* conversion in fact, or prove a positive demand and refusal, six years before action brought. Philpott v. Kelly, 1 Harr. & W. 134. 3 Ad. & Ell. 106. (30 Eng. C. L. 40.)

^b Brown v. Howard, 4 Moore, 508. 3 B. & B. 73. (6 Eng. C. L. 25.)

^c Short v. M'Carthy, 3 B. & A. 626. (5 Eng. C. L. 403.)

^d Howell v. Young, 8 D. & R. 14. 5 B. & C. 259. (11 Eng. C. L. 219.)

(1) (The length of time requisite to bar a claim by the act of limitations, is not increased

Where a client employs an attorney to conduct a suit, it is an entire contract to carry on the suit to its termination, and determinable only on reasonable notice; and where no such notice has been given, the statute of limitations is no bar to that part of the demand which is for business done more than six years before the commencement of an action by the attorney for business done in the suit, which was not brought to a termination till within six years of the commencement of the action.^a(1)

Attorney's bill.

Where a personal representative having found among the papers of the deceased a mortgage deed, and having assigned it more than six years before the action, for the mortgage money, affirming and reciting in the deed of assignment, that it was a mortgage deed, made or mentioned to have been made between the mortgagor and mortgagee for that sum; it was held, that the assignee could not recover back the mortgage money, although it turned out that the mortgage was a forgery, and that the assignee did not discover the forgery till within six years before he brought his action, it appearing that the assignor did not know it to be a forgery.^b

*1244

In an action for words actionable in themselves, the statute runs from the time of the speaking, although they have occasioned special damage; and the action must be brought within two years. Where special damage is the gist of the action, the statute runs from the time of the special damage only, and the limitation is six years.^c

Action for words.

Where six years had elapsed since the committing of a trespass, by cutting down trees, it was held that an action could not be maintained for the produce of the sale of the trees within six years.^d

If the six years have not expired before the death of the testator or intestate, the executor or administrator may sue at any time within a year after his death; but if the six years have expired before the death of the testator, and no action has been commenced by him, the statute is a final bar, and cannot be avoided.^e But if an action has been commenced by the testator or intestate, which is abated by his death, the executor or administrator shall have a reasonable time after his death (*semble* a year) to commence a new action, and thereby take the case out of the statute, though the six years may have elapsed before such action has been commenced.^f

Executors and administrators.

In contracts, the cause of action arises at the time that the

^a Harris v. Osbourn, 2 C. & M. 629. 4 Tyr. 445. See Rothery v. Munnings, 1 B. & Ad. 17. (20 Eng. C. L. 334.)

^b Bree v. Holbeck, Doug. 654.

^c Bac. Ab. Limitation of Actions. (D.)

^d Hughes v. Thomas, 13 East, 474.

^e Rex v. Morral, 6 Price, 30. B. N. P. 150.

^f S. N. P. 151, n. Tidd, 28.

by a transfer of the claim; all the successive owners of it have, together, only the time which the original claimant would have had. *M'Euen v. Girard*, 2 Rawle, 311.)

(1) (The statute of limitations does not begin to run against the claim of an attorney for professional compensation, before demand is made, or the professional relation is dissolved. *Foster v. Jack*, 4 Watts, 334.)

When a right of action accrues in contracts.

*1245

contract is broken; the statute therefore begins to run from the time of the breach of the contract, and not from the time that the plaintiff has sustained any damage therefrom. Therefore, where *A.* under a contract to deliver spring wheat to *B.*, had delivered winter wheat, and *B.* having again sold the same as spring wheat, had in consequence been compelled to pay damages to the purchaser; and afterwards *B.* brought an action of *assumpsit* against *A.* for his breach of contract, alleging as special damage the damages so recovered; held, that although such special damage had occurred within six years before the commencement of the action by *B.* against *A.*, yet that the breach of contract having occurred and become known to *B.* more than six years before that period, the statute of limitations was a bar to the action.^a Upon a promise of indemnity the statute begins to run from the actual damnification.^b

Where *A.* in consideration of *B.*'s supplying *C.* with goods guarantees to *B.* the payment of the price; *B.* having supplied *C.* with goods, and *C.* having neglected to pay the price, *A.* in consideration of *H.*'s extending to *C.* a period of two years and upwards, for the liquidation of his debt, agrees to reserve to *B.* all right and claim which *B.* may now have against him; *A.* by virtue of the security previously entered into on *C.*'s behalf and to be bound by it, if, at the expiration of such period, *B.*'s demand shall not have been fully discharged; held, that *A.*'s liability attached upon default made by *C.* after the expiration of two years and a few days; that *B.*'s right of action then accrued, and that, therefore, the statute of limitations then began to run.^c So, where by a local turnpike act, the trustees were to pay first the expenses of obtaining the act, and next the expenses of erecting toll-houses, &c., a builder who brought an action for work and labor in so doing, more than six years after the work done, but within six years of the time when the trustees had funds in hand by having paid off the expenses of the act; it was held, that he was too late, as the action was maintainable immediately after the work done, though the execution would have been postponed.^d

Where goods were sold at six months' credit, payment to be then made by a bill at two or three months; held, that this was in effect a nine months' credit, and that the statute did not
 *1246 *begin to run until nine months after the goods were sold.^e If goods be consigned to a factor for sale, an action does not lie against him for not accounting until after a demand made of an account; the statute, therefore, does not, in such case begin

^a *Battley v. Faulkner*, 3 B. & A. 288. (5 Eng. C. L. 288.)

^b *Huntley v. Sanderson*, 1 C. & M. 467.

^c *Holl v. Hadley*, 4 Nev. & M. 515. (29 Eng. C. L. 206.)

^d *Emery v. Day*, 1 C. M. & R. 245. 4 Tyr. 695.

^e *Helps v. Winterbottom*, 3 B. & Ad. 431. (29 Eng. C. L. 116.) *Dubitante*, Parke, J., who thought that the statute began to run at the expiration of six months, as no bill was given.

to run until after demand is made.* If there be a contract to pay a sum of money, or do any act on a contingency, the statute does not begin to run until the event has occurred^b.(1)

2.—*Bills and notes.*] Where a bill or note is made payable on demand, the statute begins to run from the *date*, for it is payable immediately, without an actual demand being made.^c And it makes no difference that it is made payable with interest.^d But if it be made payable at a certain period *after* demand, the statute does not begin to operate until the note becomes due. As where a note was made payable two years after demand; it was held, that the statute did not begin to run until two years had elapsed after a demand had been made.^e So if a note be made payable after sight, the statute does not begin to run until after it has been presented for payment.^f So if a bill be made payable twelve months after notice, the statute does not begin to run until twelve months after notice has been given.^g

When the statute begins to run, in respect of bills and notes.

Where the maker of a promissory note deposited it with a banker, to be delivered to the payee on his producing another note cancelled; it was held, that the cause of action to the payee accrued on his receiving the note from the banker, and that the statute began to run from that period, and not from the date of the note.^h

As a cause of action cannot be said to exist unless there be a person in existence capable of suing; it has been held in an

*1247

* *Topham v. Braddick*, 1 Taunt. 579.

^b *Shulford v. Borough*, Godb. 437. *Fenton v. Emblers*, 1 Bl. 353.

^c *Christie v. Fenswick*, S. N. P. 136.

^d *Norton v. Ellam*, 2 Mees. & Wels. 461. 1 Mur. & Hur. 69.

^e *Thorpe v. Coombe*, 8 D. & R. 347. (16 Eng. C. L. 344.) *Nom. Thorpe v. Booth*, R. & M. 388. (91 Eng. C. L. 468.) *Wittersheim v. Carlisle*, (Countess of,) 1 H. Bl. 631.

^f *Homes v. Kerrison*, 2 Taunt. 323.

^g *Clayton v. Gosling*, 5 B. & C. 360. (11 Eng. C. L. 252.)

^h *Savage v. Aldren*, 3 Stark. 232. (3 Eng. C. L. 399.)

(1) (The statute of limitations begins to run so as to bar an action on a contract to perform certain work, from the time when the work was to be completed, and not from the time when the plaintiff received actual damage from the imperfect execution of it. *Rankin v. Woodworth*, 3 Penna. 48.

When A. entered into a contract for the purchase of land, by which the purchase money was to be paid after a certain time and interest at a certain rate; and afterwards B. was admitted to participate in the purchase: it was held, that on every payment by A., he became entitled to maintain an action against B. to recover his moiety, and consequently that the statute of limitations began to run from the time of such payment. *Brady v. Calhoun*, 1 Penna. 140.

Against a right of action dependent on the existence of a secret fraud, the statute of limitations runs only from the period of discovery. *Pennock v. Freeman*, 1 Watts, 401. *Fernam v. Brooks*, 9 Pick. 212.

As to when the statute will begin to run, see further, *Sinkler v. The Indiana, &c., Turnpike Co.*, 3 Penna. 149. *Walter v. Walter*, 1 Wharton, 292. *Leinhardt v. Ferringer*, 1 Penna. 492. *Jones v. Trimble*, 3 Rawle, 381. *McEuen v. Girard*, 2 Rawle, 311. *Morgan v. Plumb*, 9 Wend. 287. *Radman v. Hedden*, 10 Wend. 498. *Payne v. Webster*, 1 Vermont, 101. *Kaish v. Harrington*, 2 Vermont, 174. *Little v. Blunt*, 9 Pick. 488.)

action by an administrator upon a bill of exchange, payable to the intestate, but accepted after his death, that the statute did not being to run until administration was granted.^a

If the plaintiff or defendant be abroad when the cause of action accrues, the statute does not begin to run until six years after his return.

3.—*Where any of the parties is abroad.*] By the statute of James, if the creditor be abroad when the cause of action accrues, the statute does not begin to run until after his return to this country, and if he never comes into this country, the statute does not attach against him or his representatives.^b But if he once arrive in this country, or if one of several joint claimants, who were resident abroad when the cause of action arose, afterwards come into England, or if one of them was in England when the cause of action arose, the statute begins to run in the former case from the arrival of the party in England and in the latter, from the time when the right of action accrued.^c

The 4 and 5 Anne, c. 16, s. 19, contains similar provisions respecting defendants, by enacting, that if at the time the cause of action accrues the defendant be beyond the seas the plaintiff may bring his action within six years after the defendant's return.

What constitutes a return to this country.

A mere setting foot in England, as by touching at a port for a temporary purpose, in his passage from one foreign port to another, is not a *return* of the defendant to this country from beyond the seas within the meaning of the statute.^d But if the defendant, having arrived in this country, stops a few days, so that the plaintiff would have time to serve him with a writ before his departure, the statute begins to run from the time of his arrival, though his return was unknown to the plaintiff.^e(1)

Where a disability is once removed, and the statute has begun to run, no subsequent disability will stop the running.^f

*1248

*The disability must exist when the cause of action arose; therefore, if both parties be in England when the cause of action accrues, the statute will run from that period, though one or both of them afterwards go abroad, and remain absent.^g

When the cause of action accrues abroad.

Where the cause of action accrued in India, while both parties were resident there; it was held, that the plaintiff, having returned to this country, might commence an action within six years after the defendant's return to England, though more than six years had elapsed in India after the cause of action

^a Murray v. The East India Company, 5 B. & A. 204. (7 Eng. C. L. 66.)

^b Strithorst v. Græme, 2 Bl. 723. 3 Wils. 145.

^c Smith v. Hill, 1 Wils. 134. Perry v. Jackson, 4 T. R. 516. Durore v. Jones, 4 T. R. 310. Gray v. Mendez, 1 Stra. 556.

^d Gregory v. Hurril, 1 Bing. 324. (8 Eng. C. L. 335.) 8 Moore, 189.

^e See Gregory v. Hurrill, 5 B. & C. 341. (11 Eng. C. L. 251.) 8 D. & R. 270.

^f Doe v. Sheen, S. N. P. 147, n. Cotterell v. Dutton, 4 Taunt. 896.

^g See the cases in note c, ante, 1147.

(1) (Kysinger v. Baltzell, 3 Gill & Johns. 158.)

had accrued there, and during the defendant's stay within the jurisdiction of the court in that country.^a

Where the testator resided abroad at the time the cause of action accrued, and continued abroad until his death; it was held, that his executor, who resided in England, might be sued within six years after taking out probate, for the statute does not begin to run until there is a complete cause of action, and there can be no cause of action until there be some person within the realm against whom an action can be brought; a cause of action is a right to prosecute an action with effect, and there was no person in England after the testator's death whom the plaintiff could sue, until the defendant proved the will.^b

When a personal contract, made in a foreign country, is sought to be enforced in England, so much of the law as affects the merits and rights of the contract is adopted from the foreign country, and all that affects the remedy only, is taken from our own laws.^c Therefore, where an action was brought in England on a contract made in Scotland, where the limitation of time for bringing an action on such contract is forty years; it was held, that *actio non accrevit infra sex annos* was a good defence to the action, though forty years had not elapsed from the time that the contract was made.^d

Scotland is not considered as beyond the sea within the meaning of these statutes,^e but Ireland was.^f And though the 3 & 4 W. IV, c. 42, s. 7, provides, that no part of the United Kingdom of Great Britain and Ireland, &c., shall be deemed to be beyond the seas within the meaning of the statute of James, it has been decided that this provision does not extend to 4 Anne, c. 16, s. 19, and therefore, that Ireland is still a place beyond the seas within the meaning of the latter statute;^g so that, if the defendant be in Ireland when the right of action accrues, the statute does not begin to run until after his arrival in England; but though the plaintiff be in Ireland, the statute begins to run when the cause of action arises.

Ireland is not beyond the seas within the statute.

*1249

4.—*Merchants' accounts.*] The statute of James excepts Mutual "such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants." It has been decided, that this provision is not confined to accounts between merchants, in the strict acceptance of that term, it extends to all cases where there are mutual accounts and reciprocal demands, but not to cases where there is only a demand

Mutual accounts are excepted from the operation of the statute.

^a Williams v. Jones, 13 East, 439.

^b Douglas v. Forrest, 4 Bing. 686. (15 Eng. C. L. 113.) 1 M. & P. 663.

^c Per Tindal, C. J., in Huber v. Steiner, 1 Hodges, 206. 2 Bing. N. C. 202. (29 Eng. C. L. 304.)

^d British Linen Co. v. Drummond, 10 B. & C. 903. (21 Eng. C. L. 194.)

^e King v. Walker, 1 Bl. 286. ^f Anon. 1 Show. 91.

^g Lane v. Bennett, 1 Mees. & Wels. 71. 1 Gale, 368.

on one side, as in the case of a tradesman and his customer in the common way of business."⁽¹⁾

Formerly, if there was "a mutual account of any sort between the plaintiff and the defendant, for any item of which credit had been given within six years, *that* was such evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance, as to take it out of the statute. In assumpsit for use and occupation, the defendants pleaded the statute of limitations and a set off; at the trial it appeared that the plaintiff's testator let the premises to the defendants, and that at the time of his death, rent for nine years and an half was due, besides an item of 20*l.* lent to the defendant; the testator was indebted to the defendant for various articles supplied to him in their trade. The last half-year's rent, and some of the articles of the "defendant's bills for goods supplied, were within six years before the writ was issued; there never was any settled account between the testator and the defendants; the balance due to the testator at his death was 171*l.*; held, that the plaintiff was entitled to recover. "It is clearly settled," said Lord Kenyon, that "every new item and credit in an account given by one party to another, was an admission of there being some unsettled account between them, the amount of which was afterwards to be ascertained; and any act which the jury might consider as an acknowledgment of its being an open account, was sufficient to take the case out of the statute."

There must be a statement of accounts, or a payment

But now it is not sufficient to bring a case within the exception contained in this statute, that there are cross demands between the parties, unless there be a statement of accounts in writing, or evidence of one demand having been given and accepted in reduction of the other. Assumpsit for work and labor; plea the statute of limitations. It appeared that the plaintiff occupied a house and land under the defendant, at a rent of 16*l.* a year, and that he worked for the defendant for twelve years at 12*s.* a week, during which period he received no wages, nor paid any rent, there had been no statement or settlement of accounts between them; held, that the statute was a bar to so much of the demand as had accrued six years before the action was brought. "It would very much diminish the force of Lord Tenterden's act," said Parke, Baron, "if such

^a Cranch v. Kirkman, Peake, 121. Cotes v. Harris, B. N. P. 150. Wace v. Wyburn, *id.* 2 Saund. 127, n. Per Tindal, C. J., in Moore v. Strong, 1 Bing. N. C. 441. (37 Eng. C. L. 450.) 1 Hodges, 28.

^b Catling v. Skoulding, 6 T. R. 189. 2 Saund. 127, a. If goods are supplied by A. to B., and five years afterwards there are mutual dealings between the parties, *semble*, that the first item comes within the exception. Moore v. Strong, *supra*.

(1) (Ingram v. Sherard, 17 Serg. & R. 347. See Spring v. Gray's Ex'r., 6 Peters, 151. Kimball v. Brown, 7 Wend. 322. Chamberlin v. Cuyler, 9 Wend. 126. Edmonston v. Thomson, 15 Wend. 554. Hutchinson v. Pratt, 2 Vermont, 146. Wood v. Barney, *Ibid.* 369. Gold v. Whitcomb, 14 Pick. 198. Belles v. Belles, 7 Halsted, 339.)

a case as this was not within its provisions. Since that statute, there must be some acknowledgment or promise in writing, or a part payment, to take a case out of the statute of limitations. I do not say a payment must be in money; there may be a contract to furnish labor, or supply goods, but a contract or understanding must be shown, that would lessen the demand of the other party without using the statute of set off. Before Lord Tenterden's act, if a defendant had said, 'I have a demand on you, but you have a greater demand on me,' that *would have been sufficient. An open account is equivalent to such a declaration, which is no longer sufficient. Something *1251 must be proved amounting to payment."

SECTION IV.

AVOIDING THE STATUTE BY ISSUING PROCESS.

THE time of limitation is computed from the period when the right of action accrued until the *commencement* of the action. Formerly, when writs bore *teste* of a day before the day of issuing them, the commencement of the action for the purpose of saving the statute, was held to be the issuing of the writ.^b But since the uniformity of process act, the *date* and *teste* of a writ are the same; and suing out the writ of summons is the commencement of the action for all purposes.^c According to the old practice, it was sufficient, in order to prevent the statute from attaching, to issue out a writ, and get it returned at any time within the six years, without serving it on the defendant,^d and enter continuances at any time down to the writ on which the appearance was; but this practice has been abolished by the 2 W. IV, c. 39, s. 10, the uniformity of process act, which provides, "that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued

Issuing a writ to avoid the statute.

^a Williams v. Griffith, 1 Gale, 65. 3 C. M. & R. 45.

^b Johnson v. Smith, 3 Burr. 950.

^c Alston v. Underhill, 1 C. & M. 492. 3 Dowl. 26.

^d Taylor v. Hipkins, 5 B. & A. 489. (7 Eng. C. L. 169.) Harris v. Woolford, 6 T. R. 617.

within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ; and return to be made in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and, in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be."^a

Resealing. Where a writ of summons, tested in time to save the statute of limitations, was resealed in consequence of an alteration in the description of the defendant and the county in which he resided, and was not served until after the six years had expired; held, that the resealing did not amount to a re-issuing of the writ, and that it was not necessary for the plaintiff to show when the resealing took place.^b

The writ need not be served. Under this provision it is not necessary to serve, or endeavor to serve a writ to avoid the effect of the statute of limitations; it is sufficient to return it *non est inventus*, and enter it of record, but the expense of such writs as are unnecessarily issued will not be allowed to the plaintiff.^c

Continuances. If continuances are regularly entered upon the roll, the court will not look at any thing in order to contradict the roll; *e. g.*, a writ produced to show that a second writ, an *alias*, was tested on a day subsequent to the return day of the first. Where a plea of the statute of limitations stated, that the cause of action did not accrue within six years next before the commencement of the suit; plaintiff replied, that the cause of action did accrue within six years, &c.; held, that without specially replying process issued, the plaintiff might on the above replication prove a *quo minus* to have issued within the six years, and produce the roll to show the continuances regularly entered up accordingly.^{d(1)}

A bill in equity, filed by one creditor on behalf of himself and other creditors, will prevent the statute from running against any of the creditors who come in under the decree.^e

***1253** Where an action is commenced in an inferior court, and removed to a superior court, the time of limitation is computed to the commencement of the action in the inferior court.^f

^a This provision applies only to cases where it is sought to prevent the operation of some statute of limitations. *Nicholson v. Rowe*, or *Leman*, 2 C. & M. 469. 2 Dowl. 296.

^b *Braithwaite v. Montford*, (Lord,) 2 C. & M. 406.

^c *Williams v. Roberts*, 1 C. M. & R. 676. 1 Gale, 56.

^d *Dickenson v. Teague*, 1 C. M. & R. 241. 4 Tyr. 450.

^e *Sterndale v. Hankinson*, 1 Sim. 393.

^f *Mathews v. Phillips*, 2 Salk. 494. *Ld. Raym.* 553. *Bevin v. Chapman*, 1 Sid. 298. 1 Lev. 143. *Story v. Atkins*, *Stra.* 719.

(1) (As to avoiding the bar of the act by issuing process, see *Magaw v. Clark*, 6 Watts, 538. See *Soulden v. Van Rensselaer*, 3 Wend. 472. *Schermerhorn v. Schermerhorn*, 5 Wend. 513. *Davis v. West*, 5 Wend. 63.)

SECTION V.

WHAT ACKNOWLEDGMENT WILL OBIATE THE STATUTE.

WE have seen that the statute of limitations begins to run from the period when the right of action accrued, and that the remedy is barred at the expiration of six years from that period: it is observable, however, that in *actions of assumpsit*, a subsequent acknowledgment of the debt, or *promise* to pay it, whether made before or after the expiration of the six years, will give the creditor a right of suing for the debt at any time within six years from such new acknowledgment or promise. But it seems that a new acknowledgment or promise has not the effect of obviating the operation of the statute in any other case than in *assumpsit*, on a guarantee, or on a simple contract debt, including bills of exchange and promissory notes.* Formerly it was considered that any acknowledgment or admission of a debt obviated the provisions of the statute, on the grounds that the statute was founded on a presumption of payment, and that any acknowledgment which repelled that presumption was an answer to the statute, and in law amounted to a promise to pay the debt, or, in other words, operated as a waiver of the statute, even though such acknowledgment was accompanied with a refusal to pay.^b

A new promise, whether express or implied, to pay the debt, will obviate the statute

*But this doctrine has been long since overruled, and it is now clearly settled, that to take the case out of the statute there must be an *express promise* to pay, or an acknowledgment from which a *promise* to pay can reasonably be inferred;*

*1254

* Per Best, C. J., in *A'Court v. Cross*, 3 Bing. 331. (11 Eng. C. L. 194.) Per Gaselee, J., in *Scales v. Jacob*, *Id.* 638. (13 Eng. C. L. 85.) Per Abbott, C. J., in *Tanner v. Smart*, 6 B. & C. 605. (13 Eng. C. L. 273.) *Hurst v. Parker*, 1 B. & A. 92. *Gibbons v. M'Casland*, 1 B. & A. 690. In *Boydell v. Drummond*, 2 Camp. 160, Lord Ellenborough, C. J., held, that "if a cause of action, arising from the breach of a contract in not doing an act, (other than payment of money,) at a specific time, be once barred by the statute of limitations, no new promise can have the effect of reviving it." See Martin's Treatise on Lord Tenterden's Act, where this subject is very ably considered.

^b The following acknowledgments were held sufficient, "Prove your debt, and I'll pay you; or, "I am ready to account, but nothing is due." "And even slighter acknowledgments than these have been held to be sufficient. Per Lord Mansfield, C. J., in *Trueman v. Fenton*, Cowp. 544. So where the defendant, meeting the plaintiff, said, "What an extravagant bill you have sent me;" it was held to be an acknowledgment that some money was due. *Lawrence v. Worrall*, Peake, 93. So where the defendant said, "I do not consider myself as owing Mr. B. a farthing, it being more than six years since I contracted. I have had the wheat, I acknowledge, and I have paid some part of it, and 26l. still remain due." *Bryan v. Horseman*, 4 East, 599. So where the defendant said that he had been liable, but was not liable then, as the bill (for the acceptance of which he was sued) was out of date, that he would not pay it, it was out of his power to pay it. *Leaper v. Tatton*, 16 East, 420. *Douthwaite v. Tibbutt*, 5 M. & S. 75.

* "There is scarcely an admission which has not in former times been held sufficient to take a case out of the statute. In one case (*Douthwaite v. Tibbutt*, 5 M. & S. 75)

and if any thing accompanies the acknowledgment inconsistent with such promise, no promise can be implied. The new promise, whether express or implied, does not operate by drawing down the original promise to the time when the acknowledgment is made, in accordance with the former doctrine of waiver, but by conferring a new right of action; and to render it available, the declaration must contain a count conformable to such promise.*⁽¹⁾

A promise, to take the case out of the statute, must be conformable to one of the counts in the declaration.

*1255

The principal case on this subject is *Tanner v. Smart*, where all the previous decisions are reviewed. It was an action of assumpsit on a promissory note; to which the defendant pleaded the statute of limitations. At the trial, the plaintiff proved an acknowledgment by the defendant within six years, in these words:—"I cannot pay the debt at present, but I will pay it as soon as I can;" held, not sufficient to entitle the plaintiff to recover without proof of the defendant's ability to pay. Lord Tenterden, C. J., "The question in this case is whether an acknowledgment, which implied that the debt for which the action was brought had not been paid, was an answer to the statute of limitations." Having referred to the old authorities in support of the doctrine of waiver, his lordship proceeded: "If an acknowledgment had the effect which the cases in the plaintiff's favor attribute to it, one should have expected that the replication to a plea of the statute would have pleaded the acknowledgment in terms, and relied upon it as a bar to the statute; whereas the constant replication, ever since the statute to let in evidence of an acknowledgment, is that the cause of action accrued, or the defendant made the promises in the declaration, within six years; and the only principle upon which it can be held to be an answer to the statute is this, that an acknowledgment is evidence of a new promise, and as such, constitutes a new cause of action, and supports and establishes the promises which the declaration states; upon this principle,

it has been held sufficient where the defendant said he would not pay the debt. But the tide of authority is now turned, and the courts require something more. The words of the statute are, 'acknowledgment of promise,' and it means such an acknowledgment of the debt as would lead the judgment to infer that the party promised to pay it." Per Gaselee, J., in *Linley v. Bonsor*, 1 *Hodges*, 310, *post*, 1266.

^a *Green v. Crane*, 2 *Ld. Raym.* 1101. 6 *Mod.* 309. *Salk.* 28. *Pitman v. Foster*, 1 *B. & C.* 248. (8 *Eng. C. J.* 67.) *Bicknell v. Keppell*, 1 *N. R.* 20. *A'Court v. Cross*, 3 *Bing.* 329. (11 *Eng. C. L.* 124.) *Tanner v. Smart*, 6 *B. & C.* 603. (13 *Eng. C. L.* 273.)

(1) (What kind of acknowledgment will take a case out of the statute. *Church v. Fecrow*, 2 *Penna.* 300. *Gallagher v. Milligen*, 3 *Penna.* 179. *Fritz v. Thomas*, 1 *Wharton*, 86. *Crist v. Garner*, 2 *Penna.* 251. *Hogan v. Bear*, 5 *Watts*, 111. *Gleim v. Rise*, 6 *Watts*, 44. *Berghaus v. Calhoun*, *Ibid.* 219. *Peck v. Botsford*, 172. *De Forest v. Hunt*, 8 *Conn.* 179. *Rogers v. Waters*, 2 *Gill & Johns.* 64. *Keplinger v. Griffith*, *Ibid.* 307. *Frey v. Kirk*, 4 *Gill & Johns.* 509. *Kent v. Wilkinson*, 5 *Ibid.* 497. *Moore v. The Bk. of Columbia*, 6 *Peters*, 86. *Soulden v. Van Rensselaer*, 9 *Wend.* 293. *Read v. Hurd*, 7 *Wend.* 408. *Purdy v. Austin*, 3 *Wend.* 187. *Bradley v. Field*, *Ibid.* 272. *Stafford v. Bryan*, *Ibid.* 532. *Hancock v. Bliss*, 7 *Wend.* 267. *Allen v. Webster*, 15 *Wend.* 284. *Grayford v. Van Loan*, *Ibid.* 308. *Oleott v. Scales*, 3 *Vermont*, 173. *Barlow v. Bellamy*, 7 *Ibid.* 54.)

whenever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds; where it does not support them, though it may show clearly *that the debt never has been paid*, but is still a subsisting debt, the plaintiff fails." Having referred to several cases in support of this position, his lordship continues:—"All these cases proceed upon the principle that under the ordinary issue on the statute of limitations, an acknowledgment is only evidence of a promise to pay; and unless it is conformable to, and maintains the promises in the declaration, though it may show to demonstration that the debt has never been paid and is still subsisting, it has no effect. The question then comes to this, is there any promise in this case which will support the promise in the declaration? The promises in the declaration are absolute and unconditional to pay when thereunto afterwards requested. The promise proved here, was 'I'll pay as soon as I can,' and there was no evidence of ability to pay so as to raise that, which in its terms was a qualified promise, into one that was absolute and unqualified. Had it been in terms what it is in *substance*, 'prove that I am able to pay, and then I will pay,' it would have been what the promise was taken to be in *Haylin v. Hasting*,^a a conditional *promise, and when the proof of ability should have been given, but not before, an absolute one. Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment and accompanies it with an express declaration to prevent any such implication, why should not the rule *expressum facit cessare tacitum* apply?"^b *1256

Where two promissory notes, given by the defendant to the plaintiff in liquidation of a former debt, became due in 1826, and in 1827 an agreement was entered into, whereby the amount was to be paid by instalments, and the plaintiff was to retain the notes as a security for the performance of the agreement; the defendant having paid several of the instalments, failed in the performance of his undertaking in 1830; held, that the plaintiff was thereby remitted to his original rights, and that he might declare *upon the notes* at any period within six years from a breach of the contract in 1830.^c

^a Com. 54. *Ld. Raym.* 389—421. *Salk.* 29.

^b *Tanner v. Smart*, 6 B. & C. 603. (13 Eng. C. L. 273.) 9 D. & R. 549. *S. P. Scales v. Jacob*, 3 Bing. 638. (13 Eng. C. L. 85.) 11 Moore, 553. *Ayton v. Bowers*, 12 Moore, 305. 4 Bing. 105. (13 Eng. C. L. 361.) *Gould v. Shirley*, 2 M. & P. 581. *Edmunds v. Downes*, 2 C. & M. 459. 4 Tyr. 173.

^c *Irving v. Veitch, Exchequer*, M. T. 1837.

SECTION VI.

LORD TENTERDEN'S ACT.

SINCE, according to the doctrine established by *Tanner v. Smart*, the new promise is the foundation of the action, it follows that, any promise or acknowledgment made *after* the commencement of the action is no answer to the plea of the statute of limitations, though formerly it was held otherwise.* Formerly, a verbal promise or acknowledgment was sufficient, but now, by 9 Geo. IV, c. 14, (Lord Tenterden's Act,) such promise must be in writing.

No promise shall take any case out of the statute, unless it be in writing, signed by the party to be charged thereby.

*1257

Not to lessen the effect of any payment.

Section 1, after reciting the provisions of 21 Jac. I, c. 16, s. 3, and of 10 Car. I, c. 6, (the Irish Act,) enacts "that in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided always, that nothing therein contained shall alter or take away or lessen the effect of any payment of principal or interest made by any person whatever; provided also, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given, and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

Plea in abatement.

Section 2, "That if any defendant or defendants in any action on any simple contract, shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the

* See *Yea v. Fouraker*, 2 Burr. 1099. *Thornton v. Ellingworth*, 2 B. & C. 824. (9 Eng. C. L. 256.)

said acts, or this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same."

Section 3, "That no indorsement or memorandum of any payment, written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes."

Memorandum of payment on a bill or note.

Section 4, "That the said recited acts, and this act shall be deemed and taken to apply to the case of any debt or simple contract alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise."

Set-off.

*SECTION VII.

*1258

WHAT PROMISE WILL AVOID THE 9 GEO. IV, C. 14.

THIS statute did not intend to make any alterations in the legal construction to be put on the acknowledgments or promises made by defendants, but merely to require a different mode of proof, substituting the certain evidence of a writing signed by the party chargeable instead of the insecure and precarious testimony to be derived from the memory of witnesses. To inquire, therefore, whether in a given case the written document amounts to an acknowledgment or promise, is no other inquiry than whether the same words, if proved, before the statute, to have been *spoken* by the defendant, would have a similar operation and effect.* "The object of the statute," said Lord Tenterden, "was to procure that in writing for which words were previously sufficient."^b

The only effect of Lord Tenterden's Act is to require that the new promise should be in writing.

The former decisions, therefore, are still applicable, and the written acknowledgment must contain an unqualified admission of the debt from which a promise to pay may be inferred, or if qualified or conditional, the event on which payment was to be made must be shown to have happened. As where in an action on a promissory note payable with interest, the words in the letter acknowledging the debt were as follows:—"I shall be most happy to pay you both interest and principal as convenient:" held, that this was a conditional promise, and that the plaintiff was bound to give some evidence to show

Conditional promise

* Per Tindal, C. J., in *Haydon v. Williams*, 7 Bing. 166. (20 Eng. C. L. 66.) 4 M. & P. 818.

^b In *Dickinson v. Hatfield*, 5 C. & P. 46. (24 Eng. C. L. 204.) 1 M. & Rob. 141.

that the defendant was able to pay, or that it was convenient for him to do so.^a

In a letter written to the plaintiff within six years, the defendant says, "I can never be happy until I have not only paid you every thing, but all to whom I owe money;" and "your account is quite correct; and oh! that I were now going to enclose you the amount of it;" held, that this was evidence to
 *1259 "go to the jury of an acknowledgment, taking the case out of the statute; and that such promise, accompanied by this expression—"It is impossible to state to you what will be done in my affairs at present, it is difficult to know what will be best, but, immediately it is settled, you shall be informed;" was an absolute unconditional promise, and not a qualified or conditional promise.^b

Defendant having accompanied an acknowledgment of debt with an assertion that he should have nothing to do with the claim; that he wished the claimant would make him a bankrupt, and that he would rather go to gaol than pay the claimant; held, that it was properly left to the jury to consider whether the acknowledgment was one from which a promise to pay could be implied.^c

Where, in an action on a promissory note, the defendant pleaded the statute, and the plaintiff gave in evidence, as proof of acknowledgment within six years, a letter from the defendant to him, stating that "business called him to L., but should he be fortunate in his adventures, the plaintiff might depend on seeing him at R.; otherwise, that he must arrange matters with the plaintiff as circumstances would permit;" and the defendant did not show that there were any other matters besides the promissory note to which this letter could refer; held, that it was properly left to the jury to decide whether such letter referred to the matter of the note, and was a sufficient acknowledgment to take the case out of the statute; and the jury having found in the affirmative; held, that their verdict was conclusive.^d

In assumpsit for goods sold and delivered, the defendant pleaded the statute of limitations, in answer to which a letter was produced, addressed by the defendant to the plaintiff's attorney, as follows: "I this day received yours respecting T. C.'s (the plaintiff's) demand; it is not a just one. I am ready to settle the account whenever T. C. (the plaintiff) thinks proper to meet me on the business. I am not in his debt 90l.
 *1260 "nor any thing like it. I shall be happy to settle the difference by his meeting me in London, or at my house. I shall write

^a *Edmunds v. Downes*, 2 C. & M. 459.

^b *Dodson v. Mackey*, 4 N. & M. 327. (30 Eng. C. L. 377.) *Ayton v. Bowers, vel Bolt*, 4 Bing. 105. (13 Eng. C. L. 361.) 12 Moore, 105. *Scales v. Jacob*, 3 Bing. 636. (13 Eng. C. L. 85.)

^c *Linley v. Bonsor*, 2 Bing. N. C. 241. (29 Eng. C. L. 319.) 1 Hodges, 305.

^d *Frost v. Bengough*, 8 Moore, 180. 1 Bing. 266. (8 Eng. C. L. 317.)

Mr. C. (the plaintiff) on the subject;" held, sufficient to take the case out of the statute.^a

Where, in answer to a plea of the statute of limitations, letters from the defendant were produced, containing the following observations: "Plaintiff's claim, with that of others, shall receive that attention that, as an honorable man, I consider them to deserve, and it is my intention to pay them, but I must be allowed time to arrange my affairs. If I am proceeded against, any exertions of mine will be rendered abortive." "I am ready and willing to do anything and everything to satisfy Mr. F. and all my creditors; and my only regret is that by the way my father has left me I am totally unable to do more than give up (which I do by deed) almost the whole of my income to my creditors, &c.; and if I am put in prison, not one penny will my creditors ever receive; if my person is laid hold of I never will put in bail, but surrender;" the court held, that these letters did not import such a direct and unqualified acknowledgment of a debt as would authorise the court to imply a promise to pay; they imported no more than an offer on the part of the defendant to surrender his income with a view to an arrangement with his creditors, provided he should be allowed time to arrange his affairs.^b

Where, in an action on a bill of exchange, in answer to a plea of the statute of limitations, the plaintiff put in a letter from the defendant in which he promised to pay the balance due from him to the plaintiff, but did not specify any particular amount, Lord Tenterden said, that "the letter produced was evidence of a new or continuing contract at the time of its date. The act did not require the amount of the debt to be specified; before it passed, a verbal promise to pay the balance would have entitled the plaintiff to recover; a similar promise in writing will have the same effect since." But he could only recover nominal damages; the promise was only to pay a ^abalance, and there was no evidence to show what the balance was.^c

*1261

Where the defendant, by a deed reciting that he was *indebted to the plaintiff* and others, assigned his property to the plaintiff, in trust to pay all such creditors as should sign the schedule of debts annexed; provided, that if all did not sign, the deed should be void; the plaintiff never signed, nor was the amount of his debt stated; held, not a sufficient acknowledgment to take the plaintiff's debt out of the statute, although it was orally admitted that he had but one debt.^d

Where a local turnpike act provided that all orders of the trustees should be entered in a book kept for that purpose, an

^a Colledge v. Horne, or House, 10 Moore, 431. 3 Bing. 119. (11 Eng. C. L. 59.)

^b Fearn v. Lewis, 6 Bing. 349. (19 Eng. C. L. 98.) 4 M. & P. 1. *Brigstocke v. Smith*, 1 C. & M. 483.

^c Dickinson v. Hatfield, 1 M. & Rob. 141. 5 C. & P. 46. (24 Eng. C. L. 304.)

^d Kennett v. Milbank, 8 Bing. 36. (21 Eng. C. L. 313.) 1 M. & Scott, 103.

order by them to pay a bill is not an act done so as to take a debt out of the statute.^a

The following acknowledgments have been held sufficient to obviate the statute.

"I beg to say I cannot comply with your request. The best way for you would be to send me the bill you hold, and draw another for the balance of your money, 30*l.* 9*s.* 9*d.*"^b "By the end of next month I shall have my bankers' account here, and I shall remit the sum due to you in a draft on them."^c An entry in a bankrupt's examination of a certain sum being due to *A.*, is evidence of an account stated between them, which is a sufficient acknowledgment to take the case out of the statute.^d

If there be a binding promise to pay a debt, the amount may be proved by parol evidence.

*1262

Where the defendant promised in writing to pay *his proportion* of a joint debt which was more than six years old; it was held sufficient to take the case out of the statute, though the amount was not specified in the promise; it was also held that the plaintiff might prove the amount by extrinsic evidence. "Suppose," said Bayley, B., "a debt exists of a considerable standing, and suppose the defendant write, 'I do not know the amount, as we have had no settlement; nothing, however, has been paid, but if "you will ascertain what the amount is, I will pay you.' I think there is nothing in the statute to prevent evidence being given to prove such amount."^e So, where after some correspondence between the plaintiff and the defendant respecting a debt which the defendant owed to the plaintiff, the defendant wrote the following letter; "I am in receipt of yours of the 2d, I do wish I could comply with your request, for really I am, and have been very wretched on account of the amount not having been paid. I hear there is a prospect of an abundant harvest, which surely must turn into a goodly sum, and very considerably reduce the account; at all events, if it does not, the concern must be broken up, to meet it at last." The letter concluded thus, "my hope is, that out of the present harvest you will be paid;" held, a sufficient acknowledgment to take the case out of the statute, and that as there was a binding promise to pay a debt, it was immaterial that the amount of the debt was not stated, as the case of *Lechmere v. Fletcher* was an authority to show that the amount may be proved by parol evidence.^f So, where in an action on a promissory note, the evidence given to rebut a plea of the statute of limitations was, that the plaintiff's son went to the defendant's house, and said his father had sent him for a pound which the defendant paid him: saying, "this puts *E.* (the

^a *Emery v. Day*, 1 C. M. & R. 245, *ante*, 1245.

^b *Dabbs v. Humphries*, 10 Bing. 446. (25 Eng. C. L. 190.)

^c *Lang v. Mackenzie*, 4 C. & P. 463. (19 Eng. C. L. 474.)

^d *Eicke v. Noakes*, 1 M. & Rob. 359.

^e *Lechmere v. Fletcher*, 1 C. & M. 623.

^f *Bird v. Gammon*, 3 Bing. N. C. 883. (32 Eng. C. L.)

plaintiff) and me straight for the last year's interest, all but 18s. I will come next week and pay that, and get a receipt;" held sufficient, for as there was no evidence of the existence of any other debt, the jury were warranted in referring these expressions to the demand in question.^a

But the following acknowledgment in a letter from the defendant to the plaintiff has been held insufficient. "I have hitherto deferred writing to you regarding your demand upon me, in consequence of some family arrangements, through which I should be enabled to discharge your account. I have to inform you that funds have been appointed for that purpose of which *A.* is trustee, to whom I have given a statement of your account. Some time must elapse before payment, but I *have *A.*'s authority to refer you to him for further information;" held insufficient, because the statute requires that the acknowledgment or promise shall be in writing, to be signed by the party *chargeable thereby*; it was clear that in this case the defendant did not mean to render himself personally chargeable, he only referred to another, by whom the debt was to be paid.^b So, where the plaintiff, having lent the defendant a sum of money, took from him the following memorandum:—

"I O U 100*l.*—*C. R.* 30th July, 1821."

"August 17th, received 50*l.*—*C. R.*"

The last item alone was *infra sex annos*: held, that it did not amount to an acknowledgment of the existence of the prior debt, so as to take it out of the statute.^c So, where a letter in answer to an application for the debt, stated, "I will see *D.*, or write to him, I have no doubt he has paid it; if by chance he has not paid it, it is very fit it should be;" held insufficient.^d

Where *A.* and *B.*, being joint owners of a ship, were indebted to *C.* for repairs, and in 1819, *B.* became a bankrupt; in 1822, *A.* gave a bill on a third party to *C.*, payable in two months, on account of the sums due to him for the repairs; which bill, it was agreed, should, between *C.* and the third party, who accepted it, not be paid until the happening of a certain event. In 1827 the bill was paid, and in 1830 *C.* brought an action against *A.* for the balance due on account of the repairs, after having given credit for the amount of the bill, and other payments; *A.* pleaded the statute of limitations. On behalf of the plaintiff, it was contended that the payment of the bill in 1827, was equivalent to part payment of the principal by *A.*, at that period, as the acceptor should be considered as his agent for that purpose; and therefore, that it operated as a promise made by *A.* in 1827, to pay the remainder of the debt, which was

*1263

Quære, whether drawing a bill of exchange for part of a previous debt, implies a promise to pay the original debt. If it does, it is only evidence of a promise when

^a *Evans v. Davies*, 9 H. & W. 15. 4 Ad. & Ell. 840. (31 Eng. C. L.)

^b *Whippy v. Hillary*, 3 B. & Ad. 399. (23 Eng. C. L. 103.)

^c *Roberts v. Roberts*, 1 M. & P. 487. 3 C. & P. 296. (14 Eng. C. L. 313.)

^d *Poynder v. Bluck*, 5 Dowl. 570. 1 W. W. & Dav. 191.

the bill
was
drawn, not
when it
was paid.

*1264

sufficient to take it out of the statute. Lord Tenterden, C. J., "Suppose the drawing of the bill taken by itself to be evidence of an acknowledgment of a debt due on account of the original demand for which the bill was given, and the action brought, *which may be very questionable*, still the drawing was only evidence of a promise at the time when the bill was given, not at a subsequent time. The bill might be an authority to the agent to pay at another time, but no promise by the principal at such time." Pattison, J., thought the giving of the bill was not evidence to support the original demand.^a

Account
stated.

But where the plaintiff sold a library of books for the defendant, some of which were returned by the purchasers as imperfect; and the defendant wrote the following letter to the plaintiff. "I received the imperfect books, which together with cash overpaid, on the settlement of your account, amounts to 80*l.* 7*s.*, which I will pay you within two years from this date, 18th December, 1827;" held, that this letter was evidence of an account stated two years after the date thereof; and that the plaintiff might recover that sum in an action commenced within six years from December, 1829.^b

Where an administratrix sued for a debt due to her husband, and the statute of limitations was pleaded; it appeared that the cause of action arose more than six years before the commencement of the action, but that within six years the defendant and the plaintiff's agent had gone over the items of the account and struck a balance, which the defendant promised verbally to pay; held, that the plaintiff was entitled to recover upon the count on an account stated, as she did not go upon the original debt at all. "I take the statute 9 Geo. IV, c. 14, to apply," said Vaughan, B., "where you go for the original debt, and then give some evidence of an acknowledgment to rebut the presumption raised by the statute, that the debt has been satisfied."^c

*1265

*SECTION VIII.

PART PAYMENT ON ACCOUNT.

THE 9 Geo. IV, c. 14, s. 1, provides "that nothing therein contained shall alter or take away, or lessen the effect of any payment of principal or interest made by any person whatsoever."

^a Gowan v. Forster, 3 B. & Ad. 507. (23 Eng. C. L. 133.)

^b Wheatley v. Williams, 1 Mees. & Wels. 533. The court said in this case, that the letter, if duly stamped, would be a valid promissory note.

^c Smith v. Forty, 4 C. & P. 126. (19 Eng. C. L. 305.)

Before the passing of this act, payment of the interest, or part payment of the principal,^a took the debt out of the statute, "because it was evidence of a fresh promise;"^b and this statute has made no alteration in that respect. Therefore, payment made within six years, of interest which had become due on a note more than six years old, has been held sufficient to take the case out of the statute.^c

But the payment must be proved by some person who witnessed it, or by the defendant's admission in writing; for proof of his *verbal* acknowledgment of payment or part payment, will not be sufficient.^d If, however, the payment of a sum of money is proved as a fact, and not by a mere admission, its appropriation to a particular account, whether in respect of principal or interest, may be shown by declarations of the party making the payment, and such declarations need not have been at the time of such payment.^e The mere fact of the payment of a sum of money by the defendant to plaintiff, is not enough to take a case out of the statute, without some evidence to satisfy a jury, first, that it was a payment of a debt, and next, that it was not the discharge of a balance due, but a payment intended to be applied to the part discharge of the particular debt.^f In order to take a case out of the statute, a payment of 12s. as interest money, was proved; held, that this did not justify a verdict finding a debt for 13l. 10s.^g

The payment must be made by the defendant, or by some person acting under his authority. The statute does not extend to a payment made by a mere stranger; for if it did, it would be very easy, in every instance, to deprive the defendant of the benefit of it.^h Therefore, where the defendant having entered into a composition with all his creditors except the plaintiff, employed one *F.* to tender to the plaintiff a certain sum, in satisfaction of his demand; and the plaintiff having refused to take the sum on the terms proposed, *F.* gave it to him in

^a "The meaning of part payment of the principal is not the naked fact of payment of a sum of money, but of payment of a smaller on account of a greater sum due from the person making the payment to him to whom it is made; which part payment implies an admission of such greater sum being then due, and a promise to pay it; and the reason why the effect of such payment is not lessened by the act is, that it is not a mere acknowledgment by words, but it is coupled with a fact. The same observation applies to interest." Per Parke, B., in *Waters v. Tompkins*, *infra*.

^b Per Parke, J., in *Gowan v. Forster*, 3 B. & Ad. 511. (23 Eng. C. L. 133.)

^c *Bealy v. Greenslade*, 2 C. & J. 61. 2 Tyr. 121. But payment on account of principal does not admit interest, unless the latter be shown to have composed part of the claim, and to be connected therewith. *Collyer v. Willoch*, 4 Bing. 313. (13 Eng. C. L. 447.)

^d *Willis v. Newham*, 3 Y. & J. 518. But if part payment or payment of interest is proved by any legal mode, and not by admission only, this case is not authority that such proof is not sufficient. Per Parke, B., in *Waters v. Tompkins*, *infra*.

^e *Waters v. Tompkins*, 1 Tyr. & G. 137. 2 C. M. & R. 723. 1 Gale, 323.

^f *Tippetts v. Heane*, 1 C. M. & R. 252. 4 Tyr. 773.

^g *Leeson v. Smith*, 4 Nev. & M. 304. (30 Eng. C. L. 379.)

^h Per Tindal, C. J., in *Linley v. Bonsor*, 2 Bing. N. C. 241. (29 Eng. C. L. 319.)
1 *Hodges*, 309.

part payment of the debt, of which the defendant disapproved; held, not sufficient to take the case out of the statute; for as *F.* was not authorised to make such payment, he acted merely as a stranger.^a

Payment of money into court generally, upon a count for goods sold and delivered, does not deprive the defendant of the benefit of the statute, as to the residue of the plaintiff's demand.^b

SECTION IX.

PAYMENT BY ONE OF SEVERAL JOINT DEBTORS.

Payment by one of several joint debtors will avoid the statute as to all.

*1267

PREVIOUS to Lord Tenterden's act, an *acknowledgment* or *promise* made by one of several joint debtors or contractors, took the case out of the statute as to all.⁽¹⁾ But by this statute it is provided, *that no written *acknowledgment* or *promise* made by one or more joint contractors, shall bind any of the other joint contractors. But as the effect of payment continues to be the same as it had been before the statute came into operation, payment of interest by one of two or more joint debtors, takes the case out of the statute as against all. The leading case on this subject is *Whitcomb v. Whiting*,^c which was an action upon a joint and several promissory note, made by the defendant and several others. The statute of limitations having been pleaded, the plaintiff as an answer to the plea, proved at the trial, payment of interest, and part payment of the principal, by one of the other parties to the note, within six years; held, sufficient to take the case out of the statute; Lord Mansfield, C. J., observing, that payment by one was payment by all, the one acting virtually as agent for the rest; and that the payment amounted to an admission from whence the law would raise a promise.^d The propriety of this decision was questioned by the court in a subsequent case;^e but it was fully sustained and acted upon in the following case, and is recognised as established authority at this day. This was an action by the payee upon the joint and several promissory note of *S.* and *B.*, against the administratrix of *S.* To meet a plea of the statute of limitations, the plaintiff proved a payment of interest, and part of the principal by *B.* within

^a *Id.*

^b *Long v. Greville*, 3 B. & C. 10. (10 Eng. C. L. 5.) 4 D. & R. 632.

^c Doug. 652.

^e *Whitcomb v. Whiting*, Doug. 652.

^d *Atkins v. Tredgold*, 2 B. & C. 23. (9 Eng. C. L. 12.)

(1) (*Searight v. Craighead*, 1 Penna. 135. *Croit v. Tracy*, 8 Conn. 268. 9 Conn. 1. *Austin v. Bostwick*, 9 Conn. 496. *Patterson v. Croate*, 7 Wend. 441. *Getchill v. Heald*, 7 Greenleaf, 26. *Nathaway v. Haskill*, 9 Pick. 42.)

six years, and in the lifetime of *S.* the deceased; held, sufficient to take the case out of the statute. Lord Tenterden, C. J., said, that a part payment by one was an admission by both that the note was unsatisfied, and that it operated as a promise by both to pay according to the nature of the instrument, and, consequently, as a promise by the defendant's intestate to pay on his several promissory note. "I think," said Bayley, J., "that the part payment by one operates in point of legal effect as a new promise by all and each of the promisers to pay, according to the nature of the instrument." "*Whitcomb v. Whiting, and Jackson v. Fairbank*,"^a said Holroyd, J., "are in *point, and *1268 must govern the present case. It seems to me, that where two persons jointly and severally promise to pay one and the same sum of money, each of them makes the other his agent, for the purpose of making any payment in respect of that sum of money. That being so, *B.* made the payment in question, as the agent, and by the authority of *S.* It was, therefore, an admission by the latter, that the sum remaining due on the note was an existing debt, and it operated as a fresh promise by him to pay the same."^b

Where one of two makers of a joint and several promissory note became a bankrupt, and the payee received a dividend under the commission on account of the note, within six years; it was held sufficient to preclude the other joint maker from availing himself of the statute of limitations, in an action against him for the remainder.*

Receipt of
a dividend
under a
commis-
sion.

The propriety of this decision, however, was doubted in a subsequent case, where one of two joint drawers of a bill of exchange became a bankrupt, and under his commission the indorsee proved a debt (beyond the amount of the bill) *for goods sold, &c.*, (for which he held the bill as a security), and received a dividend within six years. In an action on the bill against the other joint drawer, who pleaded the statute of limitations, it was contended, on the authority of *Jackson v. Fairbank*, that the payment of the dividend took the case out of the statute; the court thought that *Jackson v. Fairbank* had gone too far, as the acknowledgment, besides being a constructive one, was made by the assignees, who never could be called upon for contribution; but they distinguished the present case from it, inasmuch as in the former case, the dividend was received on the instrument itself, whereas in the latter, the dividend was received on a distinct debt, viz., goods sold, and the instrument was only introduced incidentally. They therefore held, that the receipt of the dividend did not revive the de-

^a *Post*, 1268.

^b *Burleigh v. Stott*, 8 B. & C. 36. (15 Eng. C. L. 151.) *S. P. Pease v. Hirst*, 10 B. & C. 122. (21 Eng. C. L. 38.) *Wyatt v. Hodson*, 8 Bing. 309. (21 Eng. C. L. 301.) 1 M. & Scott, 442. *Chippendale v. Thurston*, M. & M. 411. 4 C. & P. 98. (19 Eng. C. L. 393.) *Perham v. Raynal*, 2 Bing. 306. (9 Eng. C. L. 413.)

^c *Jackson v. Fairbank*, 2 H. Bl. 840.

mand *against the defendant.* Where a joint note was made by a man and a woman, and the woman afterwards married, and a joint action was brought against the husband and wife and the other maker, laying the promise by the other maker and the woman *dum sola*; held, that evidence of a promise by the other maker within six years, was not a sufficient answer to a plea of the statute of limitations.*

The payment must be on account of the joint debt.

It must distinctly appear, that the payment by one of several joint debtors was made on account of the joint debt, in order to affect the other party. It is therefore not sufficient to prove a general payment by a joint maker of a note within six years, so as to throw it upon the defendant to show that such payment was not made on account of the note; for *prima facie* the debt is barred by the statute, and it is for the plaintiff to show how the statute has been avoided.*

Payment after the joint liability has ceased will not avail.

The principle upon which part payment by a joint debtor is allowed to affect the other parties is, the community of interest between them and the presumption that the party paying would not acknowledge that which was adverse to his own interest. Therefore a payment made by one of the parties, after such community of interest and joint liability has ceased to continue, will not take the debt out of the statute as to any other party. Where *A.* and *B.* made a joint and several note, and ten years after *A.*'s death *B.* paid interest on it: in an action on the note against the executors of *A.*, it was held, that the payment by *B.* did not take the case out of the statute, so as to render them liable, for the joint contract had ceased to exist at the time when the payment was made, it having been determined by the death of *A.*; and the mere fact of the existence of a debt owing from the testator was not evidence of a promise to pay by the executors.* So where after the death of one of the makers of a joint and several promissory note, his executrix paid interest on the *note; it was held, that such payment did not take the case out of the statute, as against the surviving joint maker. "We think," said Lord Tenterden, "that where a joint contract is severed by the death of one of the contractors, nothing can be done by the personal representative of the other to take the debt out of the statute as against the survivor."*

*1270

Where overseers borrowed money for the parish and gave promissory notes signed by them "as overseers," for the amount; it was held, that payment of interest by order of the vestry (the

* *Brandram v. Wharton*, 1 B. & A. 463.

* *Pittam v. Foster*, 1 B. & C. 248. (8 Eng. C. L. 67.)

* *Holme v. Green*, 1 Stark. 488. (9 Eng. C. L. 479.) *Tippets v. Heane*, 1 C. M. & R. 252, *ante*, 1266. There must be reasonable evidence of the identity of the debt on which the interest is paid with that sued for. Per *Parks, B.*, in *Waters v. Tompkins*, 1 Gale, 326.

* *Atkins v. Tredgold*, 2 B. & C. 23. (9 Eng. C. L. 12.) *Pittam v. Foster*, *supra*.

* *Slater v. Lawson*, 1 B. & Ad. 396. (30 Eng. C. L. 409.) But see *Jackson v. Fairbank*, *ante*, 1268.

allowance of the account being signed by one of the overseers) was sufficient to take the case out of the statute as against all the overseers; for as one of them had signed the accounts, it was a recognition of the parish as his agent to pay the interest; and payment by one was payment by all.^a

SECTION X.

WHAT AMOUNTS TO PAYMENT.

It is not necessary that the payment should be in money in order to take a case out of the statute. Where goods were supplied by the defendant to the plaintiff, in pursuance of an agreement that they should be taken in part payment of a previous debt; it was held sufficient.^b If interest be allowed in the settlement of an account between the parties, it is equivalent to payment. *A.* and *B.* gave a promissory note for 600*l.* to *C.*; in an action by *C.* against *A.* and *B.*, an account in which *B.* as between himself and *C.* gave credit for interest "upon the note, was held sufficient to avoid the statute."^c So ^{*1271} where the interest was one of the items in an account of which the party paid the balance; it was held, equivalent to actual payment.^d

SECTION XI.

BY AND TO WHOM THE PROMISE MUST BE MADE.

THE 9 Geo. IV, c. 14, requires that the acknowledgment or promise, to be made available, must be in writing, and signed *by the party chargeable thereby.*^e It is clear, therefore, that an acknowledgment or promise made by any other person than ^{By whom the promise must be made.}

^a *Row v. Pettit*, 1 Ad. & Ell. 196. (98 Eng. C. L. 66.) 3 N. & M. 456, *nom.* *Crew v. Pettit*.

^b *Hart v. Nash*, 1 Gale, 171. 2 C. M. & R. 337. *Hooper v. Stevens*, 1 H. & W. 480. 5 N. & M. 635. 7 C. & P. 260. "I do not say a payment must be in money; there may be a contract to furnish labor or supply goods; but a contract or understanding must be shown, that would lessen the demand of the other party, without using the statute of set-off." Per Parke, B., in *Williams v. Griffith*, *ante*, 1251. "It is quite clear that there must be a payment of principal or interest either in cash or something equivalent." Per Alderson, B., *Id.*

^c *Manderston v. Robertson*, 4 M. & R. 440.

^d *Chippendale v. Thruston*, M. & M. 441. 4 C. & P. 98. (19 Eng. C. L. 293.)

^e See *Whippy v. Hillary*, 3 B. & Ad. 399. (23 Eng. C. L. 103.) *ante*, 1263.

the debtor himself is insufficient.⁽¹⁾ Where the debtor's wife wrote a letter to the creditor, proposing to pay the debt by instalments, in her husband's name and at his request; it was held, not sufficient to take the case out of the statute; "for," said Tindal, C. J., "if the legislature intended that a signing by an agent should be sufficient, they would have so expressed it; as in the 3d and 17th sections of the statute of frauds." And though the effect of payments is excluded from the operation of the statute, it has been held, that payments made by a stranger, or by any person not acting under the authority of the debtor, will not avoid it.^b

To whom
the pro-
mise must
be made.

Formerly an acknowledgment made even to a stranger was deemed sufficient to take the case out of the statute.^c But now as the acknowledgment must imply a promise to pay, and as such new promise is the ground of the action, it will not be sufficient unless made to the creditor, or to some person representing him or acting on his behalf. An acknowledgment by the acceptor of a bill of exchange, that he was liable thereon to the payee but not to the *drawer*, there being no consideration for the acceptance, was held insufficient to take the case out of the statute in an action by the drawer; for the defendant denied his claim.^d An acknowledgment to an executor or administrator will not support a count laying the promises to the testator or intestate.^e

Promise
to admin-
istrator.

Payment of interest upon a promissory note by the makers, to the administrator of the payee, has been held sufficient to avoid the statute, though the administrator had neglected to take out letters of administration in the diocese in which the note was *bonum notabile*.^f

Where the trustees of certain legatees lent part of the trust-money to the defendants on their joint promissory note, in which the trustees were described as such; it was held, that payment of interest and of part of the principal, to one of the legatees, was sufficient to take the case out of the statute in an

^a Hyde v. Johnson, 2 Bing. N. C. 776. (29 Eng. C. L. 488.) 2 Hodges, 94. Gibson v. Bagshott, 5 C. & P. 211. (24 Eng. C. L. 384.) But if the party cannot write, it seems that his mark would be sufficient; for it was so decided under the 5th sec. of the statute of frauds, which requires a witness to *subscribe* the will. Addy v. Grex, 8 Ves. 185.

^b Linley v. Bonsor, 2 Bing. N. C. 241. (29 Eng. C. L. 319.) 1 Hodges, 305. *Ante*, 1259.

^c Peters v. Brown, 4 Esp. 46. Halliday v. Ward, 3 Camp. 32. Mountstephen v. Brooke, 3 B. & A. 224. And see Clark v. Hougham, 2 B. & C. 149, (9 Eng. C. L. 47,) *post*, 1274.

^d Easterly v. Pullen, 3 Stark, 186. (14 Eng. C. L. 176.)

^e Sarell v. Wine, 3 East, 409. 2 Saund 63, g. See Atkins v. Tredgold, 2 B. & C. 29, (11 Eng. C. L. 12,) *ante*, 1269. Pittam v. Foster, *id*.

^f Clarke v. Hooper, 10 Bing. 480. (25 Eng. C. L. 207.) 4 M. & Scott, 353.

(1) (A promise by husband and wife during coverture to pay the debt of the wife contracted *dum sola*, and which was barred by the statute of limitations, will not revive the debt so as to give a right of action against the wife after the death of the husband. *Kline v. Guthart*, 2 Penna. 490.)

action by the trustees on the note; for payment to the legatee was nothing more than payment to the agent of the trustees, the legatee being a party interested in the note.^a

SECTION XII.

THE PLEADINGS.

It has been already stated, that there must be a count in the declaration conformable to the acknowledgment or new promise. Where the debt is revived by an absolute promise, it is sufficient to declare upon the original promise, for in such case both promises are the same. Or there may be a count on an account stated with the party entitled to the debt at the time of the new promise. But when the promise is on a contingency *or a condition, as that the defendant would pay when able, or on the happening of a certain event, it may be advisable to introduce a special count, stating the existing debt to be the consideration of the promise, and averring the contingency to have happened, or the condition to have been performed; though, in *Tanner v. Smart*, Lord Tenterden seems to have considered that the happening of the contingency, or the performance of the condition, converted the conditional promise into an absolute one.^b *1273

The statute of limitations, independently of the new rules, must be specially pleaded; it cannot be taken advantage of in evidence under the general issue.^c(1) There are two modes of pleading it; 1st, *That the plaintiff did not undertake within six years.* 2dly, *That the action did not accrue within six years.* The former is applicable in cases of assumpsit only where the consideration is executed, as in contracts for goods sold and delivered, money lent, &c. The latter is the safest and best way of pleading the statute in *all* actions, whether on contracts or on torts.^d How the statute must be pleaded.

Where in an action for deceitfully delivering goods to the plaintiff as the proper goods of the defendant, whereby the plaintiff was damaged; a plea of *not guilty* within six years, was held to be bad on special demurrer; *Abbott, C. J.*, observing, that the invariable form of pleading the statute to an action

^a *Meggison v. Harper*, 2 C. & M. 323.

^b See Marten on Lord Tenterden's Act, page, 39.

^c There are various reasons assigned for this, which are discussed at considerable length in 2 Saund. 63, to which the reader is referred.

^d 1 Saund. 33, n. 2. 283, n. 2. 2 Saund. 63, c.

(1) (*It seems that under the plea of nil debet, the defendant may give the statute of limitations in evidence. Davis v. Shoemaker*, 1 Rawle, 135.)

upon the case for a wrong has been, to allege that the cause of action did not accrue, &c. The import of "not guilty," was doubtful. If it meant the same as "the cause of action did not accrue," there was no reason for a departure from the usual form. If the import was different, it was a plea not warranted by the statute, and certainly it was not a good plea at common law.^a

*1274 So to a declaration in trover by an administrator for a conversion after the death of the intestate, a plea of not guilty of the premises within six years, has been held bad on special demurrer, it not being equivalent to an allegation that the cause of action did not accrue within six years.^b

In assumpsit, on several promises in different counts, if the defendant plead the statute of limitations to the whole, and it is a bad plea as to one of the counts, it will also be insufficient as to the residue.^c

Replication.

The replication is in general a mere traverse of the plea. In assumpsit it must be consistent with the promises laid in the declaration. If the promise declared upon be absolute, the promise laid in the replication must not be conditional.^d If the plaintiff relies on any of the exceptions in the statute; as that he, or the defendant, was beyond seas at the time when the action accrued, or that he was an infant, or *non compos*, &c., it should be replied *specialty*.^e It seems doubtful whether fraud, practised by the defendant, can be replied as an answer to the statute.^f

The statute must be replied to a set-off; it cannot be taken advantage of otherwise.^g A plea of set-off stated, that the plaintiff made his promissory note payable to *A. C.*, which was duly indorsed and delivered to the defendant at *A. C.*'s death, by *A. C.*'s administrator, and was unpaid. Replication that the supposed cause of set-off on the said note did not accrue to defendant within six years, in manner and form, &c.; held, that this replication admitted not only the making of the note, but the indorsement of it to the defendant by *A. C.*'s administrator, and that the defendant might, therefore, avail himself of memorandums of the payment of interest, written on the note by *A. C.* (before Lord Tenterden's act) to bar the statute of limitations.^h

^a *Dyster v. Battie*, 3 B. & A. 448. (5 Eng. C. L. 344.)

^b *Pratt v. Swaine*, 8 B. & C. 285. (15 Eng. C. L. 219.)

^c *Webb v. Martin*, 1 Lev. 48.

^d *Tanner v. Smart*, 6 B. & C. 606. (13 Eng. C. L. 273.)

^e See *Plummer v. Woodburne*, 4 B. & C. 625. (10 Eng. C. L. 424.) 2 Saund. 124. 127, b.

^f *Clark v. Hougham*, 2 B. & C. 149. (9 Eng. C. L. 47.)

^g *Chappel v. Durston*, 1 C. & J. 1.

^h *Gale v. Capern, or Capron*, 1 Adol. & Ellis, 102. (25 Eng. C. L. 46.) 3 Nev. & M. 863.

*SECTION XIII.

EVIDENCE.

WE have seen that where payment is given in evidence in answer to the statute it must be proved by some person who witnessed it, or by the defendant's admission in *writing*; proof of his *verbal* acknowledgment of payment will not be sufficient.^a But if payment be proved as a fact, the appropriation of it to a particular account may be proved by oral evidence, or the admissions of the defendant.^b Where a written instrument, containing a promise to pay a debt barred by the statute is lost, its contents may be proved by oral evidence.^c

In assumpsit for goods sold and delivered, the general issue and a plea of the statute of limitations were pleaded; the plaintiff's replication traversed the latter plea; his evidence consisted of such an admission by the defendant as would have been evidence to go to a jury, on the general issue, that a debt was owing from him to the plaintiff, but he did not prove when the debt was contracted; no evidence was given for the defendant in support of his plea; held, that it was incumbent on the plaintiff to support the affirmative terms of his replication, by showing that the debt was contracted within six years, or that the acknowledgment or promise was made in some writing signed by the defendant, so as to take the case out of the statute.^d

SECTION XIV.

LIMITATION OF ACTIONS IN RESPECT OF REALTIES.

FORMERLY the period of limitation in actions of ejectment was regulated by 21 Jac. I, c. 16, but now, the limitation of all actions and suits relating to real property, is governed by the 3 & 4 W. IV, c. 27.^e

*Sec. 1, is an interpretation clause, and enacts, that the word "land," shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes, (other than

^a Willis v. Newham, 3 Y. & J. 518, *ante*, 1265.

^b Waters v. Tompkins, 2 C. M. & R. 723, *ante*, 1265.

^c Haydon v. Williams, 7 Bing. 163, (20 Eng. C. L. 86,) *ante*, 1258.

^d Wilby v. Henman, 2 C. & M. 658.

^e A writ of intrusion falls within the 32 Hen. VIII, c. 2, and may be sued out after the determination of an estate *per autre vie*; the period of limitation is fifty years. *Piercy v. Gardner*, 3 Hodges, 103. 3 Eng. N. C. 748. (32 Eng. C. L.)

tithes belonging to a spiritual or eleemosynary corporation sole,) and also to any share, estate, or interest in them, or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "rent," shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land except moduses, or compositions belonging to a spiritual or eleemosynary corporation sole, &c.

No land or rent to be recovered but within twenty years after the right of action accrued to the claimant or some person whose estate he claims. When the right shall be deemed to have accrued: in the case of an estate in possession. On dispossession. On abatement or death.

*1277

On alienation.

Sec. 2, enacts, "that no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same."

Sec. 3, enacts, "that in the construction of this act the right to make an entry or distress, or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such disposition or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the

estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken."

In case of future estates.

In case of forfeiture or breach of condition.

The following case has occurred upon the construction of the preceding sections. In replevin for a distress for rent-charge, it appeared that the defendant's father died in 1804, having bequeathed to the defendant an annuity of 30*l.* for his life, with a power of distress. The defendant's right to distrain for the annuity accrued first in April, 1805, but he neither distrained nor received any payment on account of the annuity until 1835, when he put in a distress for the whole of the arrears since the death of the testator, that is, for twenty-nine years' rent; the court held, that the claim and title of the defendant to the annuity was barred by a lapse of twenty years since his right to distrain first accrued. "This case," said Tindal, C. J., in delivering the judgment of the court, "manifestly falls within the provision of the second section of the act, which contemplates and provides for the case where the right or title to the annuity is disputed, unless that section is to be governed and controlled, not simply explained and construed, by the third; that is, unless the third section excludes, in terms, from the operation of the second the claim of any person whose right to a rent is derived under a will by reason of the words 'other than by will,' which are found in the third section. When this case was originally before the court,* an opinion was expressed by the judges, that it was excluded from the operation of the second section by reason of its not being comprehended within the third, but on further consideration we have altered the opinion we then formed; we think that it is governed by the second section, which affords a bar to all claim and title to the annuity. That the case must have been governed by the second section, if that section had stood alone, cannot be doubted; and upon a more close examination of the third section, the object and intent of it seem to be no more than this, to explain and give a construction to the enactment contained in the second clause as to the time at which the right to make a distress for any rent shall be deemed to have first accrued, in those cases only in which doubt or difficulty might occur, leaving every case which plainly falls within

The remedy for an annuity accruing from a will is barred by a lapse of twenty years after the death of the testator.

*1278

* See *James v. Salter*, 1 Hodges, 405. 2 Bing. N. C. 505. (39 Eng. C. L. 403.)

the general words of the second section; but is not included amongst the instances given by the third to be governed by the operation of the second. This case, therefore, not falling within the third section, but falling within the clear and unambiguous terms of the second, we hold it to be governed thereby."

Where advantage of forfeiture is not taken by remainder-man, he shall have a new right when his estate comes into possession.

*1279
Reversioner to have a new right.

Sec. 4, provides, "that when any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened."

Sec. 5, provides, "that a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have first accrued, in respect of any estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent."

An administrator to claim as if he obtained the estate without interval after death of deceased. In the case of a tenant at will, the right shall be deemed to have accrued at the end of one year.

Sec. 6, enacts, "that for the purposes of this act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration."

Sec. 7, enacts, "that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or *cestui que* trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

No person Sec. 8, enacts, "that when any person shall be in possession

or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or *distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)."

after a tenancy from year to year, to have any right but from the end of the first year or last payment of rent.

*1280

Sec. 9, enacts, "that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled."

Where rent amounting to 20s., reserved by a lease in writing, shall have been wrongfully received, no right to accrue on the determination of the lease.

Sec. 10, enacts, "that any person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon."

A mere entry not to be deemed possession. No right to be preserved by continual claim.

Sec. 11, enacts, "that no continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action."

By sec. 12, the possession of one coparcener, &c., is not to be the possession of the others.

And by sec. 13, the possession of a younger brother is not to be the possession of the heir.

Sec. 14, provides, "that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be *deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at and not before the time at

Acknowledgment in writing given to the person entitled, or his agent, to be equivalent to possession or receipt of rent.

*1281

which such acknowledgment, or the last of such acknowledgments, if more than one, was given."

By sec. 16, persons under disability of infancy, lunacy, coverture, or beyond seas, and their representatives, are to be allowed ten years from the termination of their disability or death.

But no action, &c., shall be brought beyond forty years after the right of action accrued.

Sec. 17, provides, "that no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired."

Heir barred by adverse possession of forty years.

The following case has been decided under the 17th section:—Land was devised in 1774, by a man to his wife in fee; and, after having married again, she lived on the property with her second husband for nine or ten years, and then went to reside elsewhere, and they were never afterwards in possession, but under what circumstances they left was not explained; the wife died in 1828, before her husband, who survived until 1832; held, in ejectment, that the heir of the wife was barred by the adverse possession of above forty years; though the wife was always under the disability of coverture, and the husband had a tenancy by the courtesy during his life, and no fine had been levied.*

* 1282 No further time to be allowed for a succession of disabilities.

Sec. 18, provides, "that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

Scotland, Ireland, and the adjacent islands, not to be

Sec. 19, enacts, "that no part of the united kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any islands adjacent to any of them, (being part of the dominions of his Majesty,) shall be deemed to be beyond seas within the meaning of this act."

* Doe d. Corbyn v. Branston, 4 Nev. & M. 664. 3 Adol. & Ellis, 63. (30 Eng. C. L. 30.) 1 Har. & Woll. 169.

By sec. 20, when the right to an estate in possession is barred, the right of the same person to future estates shall also be barred. deemed beyond seas.

By sec. 21, where tenant in tail is barred, remainder-men, whom he might have barred, shall not recover.

By sec. 22, possession adverse to a tenant in tail shall run on against the remainder-men whom he might have barred.

By sec. 23, where there shall have been possession under an assurance, by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of twenty years after the time when the assurance, if then executed, would have barred them.

By sec. 28, a mortgagor shall be barred from bringing a suit to redeem the mortgage at the end of twenty years from the time when the mortgagee took possession, or from the last written acknowledgment.

By sec. 29, no lands or rents are to be recovered by ecclesiastical or eleemosynary corporations sole but within two incumencies and six years, or sixty years.

By sec. 30, no advowson shall be recovered but within three incumencies or sixty years.

Sec. 34, enacts, "that at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished." *1283 At the end of the period of limitation the right of the party out of possession to be extinguished. Receipt of rent to be deemed receipt of profits.

Sec. 35, enacts, "that the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee, or any person claiming under him, (but subject to the lease,) be deemed to be the receipt of the profits of the land for the purposes of this act."

By sec. 40, money charged upon lands and legacies shall be deemed satisfied at the end of twenty years if there shall be no interest paid or acknowledgment in writing in the mean time.

By sec. 41, no arrears of dower shall be recovered for more than six years.

By sec. 42, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or No arrears of rent or interest to be recovered for more than six years.

suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

*1284
Decision
under the
preceding
section.

The following case has occurred under section 42.—Where "in replevin the defendant avowed taking the goods as a distress for rent in respect of an annuity, and the defendant pleaded "that the said distress was not made within six years after the said annuity or yearly rent first became due," upon which issue was joined; it appeared that the annuity in question was granted to the defendant for his life, and that his right to distrain for it first accrued in 1805, but he neither distrained nor received any part of the annuity until 1835, when he distrained for twenty-nine years' rent; held, that though upon another issue the defendant's title to the annuity was barred by the second section of this act,^a he was entitled to a verdict on this issue under the 42d section; for upon this issue there was no objection made to the avowant's right or title to the annuity itself, but simply to the amount of the arrears claimed beyond those of the last six years, and the distress was evidently made within time for the last six years.^b

To remove some doubts occasioned by the preceding statute, the 7 W. IV, & 1 Vic. enacts, "that a mortgagee may bring an action to recover lands at any time within twenty years after the last payment of principal or interest secured by the mortgage, although more than twenty years may have elapsed since the right of action shall have first accrued."

SECTION XV.

LIMITATION OF ACTIONS UPON SPECIALTIES.

Limita-
tion of ac-
tion of
debt on

THE 3 & 4 W. IV, c. 42, s. 3, enacts, "that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other speciality, and all actions of debt or *scire facias* upon any recognisance, and also all actions

^a See *ante*, 1276.

^b James v. Salter, 3 Bing. N. C. 544. (32 Eng. C. L.) 3 Hodges, 70. "The provisions of the 42d section appear rather to apply to the recovery of rents which are an actual charge upon the land, than to mere conventional rents." Per Tindal, C. J., in Paget v. Foley, 2 Bing. N. C. 680. (29 Eng. C. L. 457.) 2 Hodges, 36, *post*, 1285, where it has been held, that this section does not apply to rent reserved by speciality.

of debt upon any award where the submission is not by specialty, *or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *feri facias*, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognisance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved within two years after the cause of such actions or suits, but not after; and the said other actions within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited.”

special-
ties, &c.
*1285

It has been held, that rent reserved by *specialty* is within the foregoing provision, and that the limitation of the right of action for the recovery thereof is ten years, and not six years, as provided by 3 & 4 W. IV, c. 27, s. 42.^a

Rent re-
served by
specialty.

Sec. 4, contains the usual provision in favor of infants, femes covert, persons of unsound mind, and persons, whether plaintiffs or defendants, absent beyond seas.

Sec. 5, provides, “that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognisance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability *as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action on any indenture, specialty, or recognisance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer of a plea to this statute.”

Proviso in
case of ac-
knowledg-
ment in
writing, or
by part
payment.

*1286

^a Paget v. Foley, 2 Bing. N. C. 679. (39 Eng. C. L. 457.) 2 Scott, 750. 2 Hodges, 32.

The limitation after judgment or outlawry reversed.

Sec. 6, enacts, "that if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, or if in any of the said actions the defendant shall be outlawed, and shall after reverse the outlawry, that in all such cases, the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after."

By sec. 7, no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, &c., shall be deemed to be beyond the seas within the meaning of this act or of the 21 Jac. I, c. 16.

*CHAPTER XVIII.

MALICIOUS PROSECUTION.

	PAGE
I. When an action will lie for a malicious prosecution.	
II. When it will lie for a malicious arrest.	1289
III. Malice and want of probable cause.	1290
IV. Determination of the original suit.	1294
V. The declaration and pleadings.	1295
VI. Evidence.	1298

SECTION I.

WHEN AN ACTION WILL LIE FOR A MALICIOUS PROSECUTION.

If a party maliciously and without reasonable and probable cause prosecute or arrest another, he is liable to an action on the case for the injury which the person so prosecuted or arrested may have thereby sustained, in his person by the imprisonment, in his property by the expense, or in his reputation by the scandal.⁽¹⁾

To support such action there must be malice express or implied, and the want of probable cause. The concurrence of both circumstances is indispensably necessary; proof of express malice is not sufficient without evidence of the want of probable cause.⁽²⁾ And "if there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable."^b "The term 'malice' in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives."^c

"An action on the case lies for maliciously suing out a commission of bankruptcy." But it must appear that the commission was superseded before the commencement of the action.^b *1288
A supersedeas, however, is no evidence of the want of proba-

^a Johnson v. Sutton, 1 T. R. 545. Turner v. Turner, Gow. 30. (5 Eng. C. L. 444.)

^b Per Parke, J., in Mitchell v. Jenkins, 5 B. & Ad. 594. (27 Eng. C. L. 131.)
Arbuckle v. Taylor, Dow. 160.

^c Per Parke, J., *Id.*

^d Brown v. Chapman, 3 Burr. 1418. Chapman v. Pickersgill, 2 Wils. 145.

^e Whitworth v. Hall, 2 B. & Ad. 695. (23 Eng. C. L. 173.)

(1) (An action on the case at common law is sustainable for a vexatious civil suit, in which there was no arrest or holding to bail. *Whipple v. Fuller*, 11 Conn. 562. *Pangburn v. Bull*, 1 Wend. 345.)

(2) (*Murray v. Lang*, 1 Wend. 140.)

ble cause, as it may proceed upon strict legal grounds.^a But if it appear that the facts upon which the commission is founded, do not amount to an act of bankruptcy, it will be sufficient to call upon the defendants to prove the affirmative of probable cause. For evidence of the absence of probable cause is, in effect, the evidence of a negative, and very slight evidence of a negative is sufficient to call upon the other party to prove the affirmative, especially where the nature of the affirmation is such as to admit of proof by witnesses, and cannot depend upon matters lying exclusively within the party's own knowledge, as in some cases of criminal prosecution it may do.^b

An action on the case may be maintained for maliciously causing the plaintiff to be excommunicated in the Ecclesiastical Court.^c So it lies at the suit of the husband for the expenses incurred in consequence of the malicious prosecution of his wife.^d So it lies for maliciously obtaining or executing a warrant to search a house for smuggled goods, if none be found there.^e If a magistrate maliciously grants a warrant against another, without any information, upon a supposed charge of felony, the remedy against him is *trespass* and not *case*.^f But though it may be *trespass* in the magistrate to grant an illegal warrant, yet an action on the case may be supported against the person who causes and procures such warrant to issue, if it is done maliciously, and without reasonable or probable cause.^g

But to sustain an action against a party for preferring a charge before a magistrate, and procuring him to grant his warrant, the charge must be wilfully false.^h It is no objection to an action for a malicious prosecution, that the plaintiff was acquitted, on account of a defect in the indictment.ⁱ A rule for a criminal information obtained by the plaintiff in an action for the malicious prosecution of an indictment, and made absolute, is no bar to such action, although the indictment was against the plaintiff and another person.^j

But an action on the case to recover damages against the lessor of the plaintiff, in a vexatious ejectment, is not maintainable.^k And if *A.* strike *B.*, and *B.* return the blow, on which *A.* indicts *B.* for an assault, the bare fact of *A.* having struck the first blow, is not sufficient to support an action for a malicious prosecution.^l

^a *Hay v. Weakley*, 5 C. & P. 361. (24 Eng. C. L. 361.)

^b *Cotton v. James*, 1 B. & Ad. 128. (20 Eng. C. L. 358.)

^c *Hocking v. Mathews*, 1 Vent. 86. See *Ackerley v. Parkinson*, 3 M. & S. 411. *Beaurain v. Scott*, 3 Camp. 388.

^d *Smith v. Hixon*, 2 Stra. 977. *Cas. temp. Hard.* 54. B. N. P. 13.

^e *Boot v. Cooper*, 1 T. R. 535, n. ^f *Morgan v. Hughes*, 2 T. R. 255.

^g *Else v. Smith*, (in error,) 1 D. & R. 97. (16 Eng. C. L. 19.) 2 Chit. 304. (18 Eng. C. L. 344.)

^h *Cohen v. Morgan*, 6 D. & R. 8. (16 Eng. C. L. 250.)

ⁱ *Wicks v. Fentham*, 4 T. R. 247. *Pippet v. Hearn*, 5 B. & Ad. 634. (7 Eng. C. L. 317.)

^j *Caddy v. Barlow*, 1 M. & R. 275. And see *Rex v. Sparrow*, 2 T. R. 198.

^k *Purton v. Honnor*, 1 B. & P. 205. ^l *Fish v. Scott, Peake*, 135.

SECTION II.

WHEN AN ACTION ON THE CASE WILL LIE FOR A MALICIOUS ARREST.

An action on the case will lie for maliciously arresting a party for a debt, where none is due, or for a larger sum than is really due. Where there are mutual accounts between the parties, the balance only is to be considered as the existing debt, for the purpose of arrest, and an action will lie against a party for arresting a debtor for the amount of one side of the account, without deducting what is due on the other.^a So, if a party, though having a reasonable and probable cause; arrests a person privileged from arrest; as where a creditor arrested a practising attorney for a just debt; it was held, that he was liable to an action for a malicious arrest, and that the fact of his knowing him to be an attorney, was an ingredient from which the jury might infer malice.^b

*An action lies for maliciously holding a party to bail, although he is never arrested, but is told that there is a writ out against him, and he goes to the sheriff's officer and gives bail.^c But where an officer, who had a writ against a man, sent to him to say so, and asked him to appoint a time to come to his office and execute a bail bond, which he did; held, not to constitute an arrest, so as to support an action for a malicious arrest. For the officer did no more than merely to give notice of the writ.^d And where *A.* by mistake sued out a bailable writ against *B.*, and gave it to *C.*, an officer, to be executed; *C.* said to *B.* he had a writ against him, but *B.* denying that he owed the money, *C.* did not take him into actual custody. On inquiry, the mistake was discovered, and *B.* was told he need give himself no farther trouble in the matter; however, he afterwards put in bail above, and incurred an expense of 14*l.*; held, that he could not maintain an action against *A.* for a malicious arrest.^e An action lies for maliciously suing plaintiff in an inferior court, and arresting him when that court had no jurisdiction of the cause.^f It seems that a party is liable to this action, though the arrest was made by his attorney, without his (the defendant's) knowledge or consent.^g

*1290
Holding
to bail.

^a *Austin v. Debnam*, 3 B. & C. 139, (10 Eng. C. L. 37,) where Abbott, C. J., disapproves of the decision in *Brown v. Pigeon*, 2 Camp. 594, holding the contrary. *Wentworth v. Bullen*, 9 B. & C. 840. (17 Eng. C. L. 503.) See *Dronefield v. Archer*, 5 B. & A. 513. (7 Eng. C. L. 177.)

^b *Whalley v. Pepper*, 7 C. & P. 506. (39 Eng. C. L.)

^c *Small v. Gray*, 2 C. & P. 605. (12 Eng. C. L. 284.)

^d *Berry v. Adamson*, 6 B. & C. 528. (13 Eng. C. L. 245.) 2 C. & P. 503. (12 Eng. C. L. 235.)

^e *Bieten v. Burridge*, 3 Camp. 139.

^f *Goslin v. Wilcock*, 2 Wils. 303. And see *Smith v. Chattel*, 2 Wils. 376.

^g *Jones v. Nicholls*, 3 M. & P. 12.

SECTION III.

MALICE AND WANT OF PROBABLE CAUSE.

There must be evidence of malice and want of probable cause.

*1291

To sustain an action for a malicious arrest there must be evidence of malice.⁽¹⁾ And even where the writ was sued out after payment of the debt, the facts of the case precluding any inference of malice, it was held, that an action for maliciously holding to bail, would not lie without direct evidence of malice.^b A discontinuance of the action has been held not *to be evidence of want of probable cause, so as to afford a presumption of malice.^c So where the plaintiff was arrested by the indorser of a bill, purporting to be drawn on and accepted by him, but not in fact accepted by him; it was held, not to be sufficient to support an action for a malicious arrest, the defendant having acted under a mistake and without malice.^d But where *A.* arrested *B.*, for money paid to his use, on the 10th of December, and was ruled to declare on the 17th; filed a declaration on the 24th, and discontinued the action, upon payment of costs, on the 31st; held, in case for a malicious arrest, that this was a sufficient *prima facie* evidence of malice, and want of probable cause.^e So where a defendant, on being taken in execution under a writ of *ca. sa.*, tendered the debt and costs to the plaintiff's attorney, required him to sign his discharge, which he refused to do until he had paid an independent collateral demand for costs; held, that the plaintiff and his attorney were liable to an action on the case for such refusal, and that the refusal was *prima facie* evidence of malice.^f

To sustain an action against an attorney for a malicious arrest, it must appear to the satisfaction of the jury that there

^a Scheibel v. Fairbairn, 1 B. & P. 388. Page v. Wiple, 3 East, 314. George v. Radford, 3 C. & P. 464. (14 Eng. C. L. 391.)

^b Gibson v. Chaters, 2 B. & P. 129. And see Silveznides v. Bowley, 1 Moore, 92, (4 Eng. C. L. 387,) and James v. Francis, 5 Price, 1.

^c Bristow v. Heywood, 1 Stark. 48. (2 Eng. C. L. 289.)

^d Spencer v. Jacob, M. & M. 180. (22 Eng. C. L. 284.) And see Jackson v. Burleigh, 3 Esp. 34.

^e Nicholson v. Coghill, 6 D. & R. 12. 4 B. & C. 21. (10 Eng. C. L. 269.)

^f Crozer v. Pilling, 6 D. & R. 129. 4 B. & C. 26. (10 Eng. C. L. 271.)

(1) (The technical malice necessary to support an action for a vexatious suit, is any improper motive, and does not necessarily imply malignity or even corruption in the appropriate sense of these terms. *Ives v. Bartholomew*, 9 Conn. 309. Malice may be, and most commonly is, in such actions, implied from the want of probable cause. The defendant, for the purpose of rebutting the inference of malice, may be let in to show for instance that he acted by the advice of counsel. The effect of such evidence is, however, for the jury. *Turner v. Walker*, 3 Gill & Johns. 377. Upon the facts proved, the question of what is probable cause, is law for the court. *Pangburn v. Ball*, 1 Wend. 345. *Maston v. Dryo*, 2 Wend. 424. As to other cases on evidence of probable cause, see *Burt v. Place*, 4 Wend. 591. *Gorton v. De Angelis*, 6 Wend. 418. *Weaver v. Townsend*, 14 Wend. 192. *French v. Smith*, 4 Vermont, 363. *Wills v. Noyes*, 12 Pick. 324. *Wengert v. Beach*, 1 Penna. 232. *Wilmerth v. Mountford*, 4 Wash. C. C. Rep. 79.)

was no reasonable or probable cause for the arrest, and that the defendant, being aware of that, caused the arrest to be made for some sinister purpose of his own. It is not necessary in such case to prove malice in fact; any improper or sinister motive will be sufficient. It is, however, a good defence to such action, that the defendant implicitly obeyed the instructions of his client.^a

We have seen that in order to sustain this action, there must be evidence of malice, and want of probable cause; it is observable, that malice is altogether a question for the jury, and that it is not necessarily implied so as to withdraw it from their consideration, even where want of probable cause is clearly proved, though the jury may infer malice from that circumstance.^b Probable cause is a mixed proposition of law and fact; when the facts are admitted or ascertained, it is a pure question of law, and it is for the court to pronounce whether such facts constitute a probable cause; but if the circumstances alleged to show a probable cause are disputed, it is for the jury to decide whether they are true or not.^c

"It is difficult," said Lord Tenterden, C. J., "to lay down any general rule as to the cases where the opinion of the jury should or should not be taken upon this point. I have considered the correct rule to be this; if there be any fact in dispute between the parties, the judge should leave that question to them, telling them, if they should find one way as to that fact, then, in his opinion, there was no probable cause, and their verdict should be for the plaintiff. If they should find in the other, then there was, and their verdict should be for the defendant."^d

Where in an action for maliciously indicting *A.* for perjury, it appeared that the defendant *B.*, in 1824, preferred the indictment, and gave evidence before the grand jury, that the bill was found and removed into K. B., and tried in 1827; that *B.* was in court at the trial, but offered no evidence, and *A.* was acquitted; the judge, in his direction, told the jury that if the defendant abstained from giving evidence, from a consciousness that he had no evidence to give which would support the indictment, then there was want of probable cause, and they should find for the plaintiff; but if he did not abstain from giving evidence on that ground, then there was no proof of want of probable cause, and they should find for the defendant. The jury having found a verdict for the plaintiff; held, upon error, and a bill of exceptions, whereby the objections stated to

^a *Stockley v. Hornidge*, 8 C. & P. 11.

^b *Mitchell v. Jenkins*, 5 B. & Ad. 588. (37 Eng. C. L. 131.) 2 N. & M. 301. See *Burley v. Bethune*, 5 Taunt. 583. (1 Eng. C. L. 196.)

^c *Sutton v. Johnstone*, 1 T. R. 545. *Nicholson v. Coghill*, 4 B. & C. 21. (10 Eng. C. L. 289.) Per Lord Denman, C. J., 5 B. & Ad. 594. (37 Eng. C. L. 131.)

^d Per Lord Tenterden, C. J., in *Blachford v. Dod*, 2 B. & Ad. 184. (22 Eng. C. L. 53.)

the summing up were, that the judge himself ought to have determined upon the facts, whether there was probable cause or not, that the direction of the learned judge was not incorrect; for it was for the jury to determine the facts which include the motives of the parties; and as the motive which induced the defendant to forbear giving evidence, was an essential ingredient in the case, it was for the jury to infer the motive from the facts.^a

Where, in an action for a malicious prosecution, the plaintiff proved a case, which in the opinion of the learned judge showed that there was no reasonable or probable cause for preferring *the indictment; the defendant then called a witness to prove an additional fact, and that being proved, the learned judge was of opinion that there was reasonable and probable cause for preferring the indictment; held, that there being no contradictory testimony as to that fact, and there being nothing in the demeanor of the witness who proved it to impeach his credit, the learned judge was not bound to leave it to the jury to find the fact, but that he might act upon it as a fact proved, and nonsuit the plaintiff.^b

But in an action on the case, for taking the plaintiff to a police office, on a charge of having uttered menaces against the defendant's life, and causing him to be imprisoned until he found bail; the court held, that it was not for the judge alone to determine whether the menaces justified the charge, but that it should have been left for the jury to say, whether the defendant had believed the menaces, and had acted *bond fide* in preferring the charge, before the judge had decided whether or not there was reasonable and probable cause.^c

Where, in an action for a malicious prosecution, it appeared that the plaintiff, a servant, being discharged from service on a Friday, took away with her from her master's house a trunk and bag, the property of her master; the defendant, her master, wrote to her the next day, demanding his property, and threatening to proceed criminally on the Monday following, if it were not restored; the plaintiff being absent from home when the letter was delivered, no answer was returned; whereupon the master, the same day, Saturday, had her taken into custody, but when she was brought before the magistrates on Monday, declined to make any charge; held, that considering the nature of the facts, the judge was justified in leaving it to the jury, whether the defendant had reasonable or probable cause to institute the proceedings.^d

• If a party lays all the facts of his case fairly before counsel,

^a Taylor v. Willans, 2 B. & Ad. 845; (22 Eng. C. L. 195;) *nom.* Willans v. Taylor, 6 Bing. 183. (19 Eng. C. L. 47.) 3 M. & P. 350.

^b Davis v. Hardy, 6 B. & C. 925. (13 Eng. C. L. 152.)

^c Venafra v. Johnson, 10 Bing. 301. (25 Eng. C. L. 141.) 3 Moor & Scott, 847.

^d M'Donald or M'Donnell v. Rooke or Brooke, 2 Bing. N. C. 217. (29 Eng. C. L. 312.) 2 Scott, 359. 1 Hodges, 314.

and acts *bonâ fide* on the opinion given by that counsel, (however erroneous that opinion may be,) it amounts to a probable *cause,* but not unless a full and correct statement of the facts be laid before counsel.* 1294

Probable cause, means a probable cause of action, and not a probable cause for any particular form of action; therefore where a party had been arrested in a *joint* action of covenant when he was not liable jointly but separately, Mr. Justice Littledale held, at *Nisi Prius*, that it did not imply a want of probable cause; "the question of probable cause," said he, "is not affected by any technicality as to the form of the action." Probable cause, to prove an available defence, must have operated on the defendant's mind at the time he did the act which forms the basis of the action; the defendant, therefore, must show that he had a knowledge of facts sufficient to induce him to believe the plaintiff's guilt, *before* he made the charge complained of.⁴

SECTION IV.

DETERMINATION OF THE ORIGINAL SUIT.

To support an action for a malicious prosecution or arrest, it must appear that the prosecution or former suit was determined; evidence of an acquittal by the verdict of the jury, or of the plaintiff's discharge in consequence of the grand jury not finding a true bill, will show a legal termination of the prosecution.* But entering a *nolle prosequi* by the attorney-general is not a sufficient determination of the prosecution, because new process may still issue on the same indictment.⁵ Proof that no declaration was filed within a year after the return of the writ, has been held to be sufficient evidence of the suit being at an end;⁶ and it makes no difference in this respect, that the cause is removed by *habeas corpus* from an inferior court, for even in such case the cause is not out of court until the end of the year, and by the 35th rule of H. T. 2 W. IV, it is provided, "that in all the courts the plaintiff shall

* Per Bayley, J., in *Ravenga v. Mackintosh*, 2 B. & C. 697. (9 Eng. C. L. 225.)
Snow v. Allen, 1 Stark. 502. (2 Eng. C. L. 485.)

⁵ *Hewlet v. Cruchley*, 5 Taunt. 277. (1 Eng. C. L. 107.)

⁶ *Whalley v. Pepper*, 7 C. & P. 511. (32 Eng. C. L.)

⁴ *Delegal v. Highley*, 3 Bing. N. C. 259. (32 Eng. C. L.) *Docwra v. Hilton*, cited, *id.* 2 N. & Perr.

⁵ B. N. P. 13. *Hunter v. French*, Wills, 517. *Morgan v. Hughes*, 2 T. R. 225. *Fisher v. Bristow*, Doug. 215.

⁶ *Goddard v. Smith*, 6 Mod. 261.

⁷ *Pierce v. Street*, 3 B. & Ad. 297. (23 Eng. C. L. 102.)

"be deemed out of court, unless he declare within one year after the process is returnable."

Proof of a rule to discontinue, and that the costs have been taxed and paid, is sufficient evidence of the termination of the suit.^b And when the judgment of discontinuance is entered up, it relates back to the day when the rule to discontinue is taken out, so that the action is to be considered as discontinued from that time.^c So a rule to stay proceedings, and deliver up to the then defendant the bill of exchange upon which the action was brought, is a sufficient termination of the proceedings.^d But the mere acceptance of the debt and costs, without the intervention of the court, cannot properly be called a determination of the suit.^e It seems, however, that the acceptance of the debt and costs in satisfaction of the action, under a judge's order, or a rule of reference, is a sufficient determination of the suit.^f Where upon the abandonment of a suit in that court by the plaintiff, it being usual to make an entry in the minute-book of "withdrawn," by the plaintiff's order, opposite to the entry of the plaint; held, that proof of such entry in the minute-book was sufficient to prove an allegation that the former suit was "wholly ended and determined."^g Where the original suit was determined by a *stet processus* by the consent of the parties, Lord Tenterden nonsuited the plaintiff, observing, "that the termination of the suit must be such as to afford *prima facie* evidence that the action was without foundation."^h

SECTION V.

THE DECLARATION AND PLEADINGS.

THE declaration should state all the circumstances necessary to support this action, namely, the falsehood of the original charge, *the malicious motives of the defendant, the absence of reasonable or probable cause, the legal termination of the suit, and the damage to the plaintiff, either by expense, imprisonment, or to his reputation. (1) The words "falsely," or "wrongfully," have been held to be sufficiently expressive of a mali-

^a Norrish v. Richards, 5 N. & M. 269. 1 H. & W. 437.

^b Bristow v. Haywood, 4 Camp. 214. Gadd v. Bennett, 5 Price, 540, post, 1297.

^c Brandt v. Peacock, 1 B. & C. 649. (8 Eng. C. L. 179.)

^d Brook v. Carpenter, 3 Bing. 297. (11 Eng. C. L. 108.) 11 Moore, 59.

^e Per Patterson, J., in Combe v. Capron, 1 M. & Rob. 398.

^f *Id.*

^g Arundell v. White, 14 East, 216.

^h Wilkinson v. Howel, M. & M. 495. (22 Eng. C. L. 368.)

(1) (Riley v. Gourley, 9 Conn. 154.)

cious intent.^a But the words "wrongfully and injuriously" are insufficient, as they do not necessarily imply malice.^b The proceedings in the former suit should be correctly stated, for a variance will in some cases be fatal. Where it was stated that the trial and acquittal was "in the court of our lord the king, before the king himself," and it appeared that the trial had been at *Nisi Prius*, it was held to be a fatal variance.^c So where the declaration stated that the defendant imposed upon the plaintiff the crime of felony, and upon the prosecution of the information taken before the justices, it appeared that the charge amounted only to a civil injury, though the warrant was to arrest the plaintiff on a suspicion of felony; it was held to be a fatal variance.^d

The statement of an indictment should accord with the caption or style of the particular sessions; but a declaration for maliciously indicting at the general *quarter* sessions, instead of the general sessions, was held sufficient; because the indictment was cognisable at both sessions, but if the offence had been cognisable at the *quarter* sessions only, the declaration would be bad.^e After verdict, in an action for a malicious prosecution for perjury, it was held to be no objection to the description of the court in which the indictment was found, that the names of the justices before whom the session of *oyer* and *terminer* was held, were not set out; and it was deemed sufficient to allege, that at such a session the defendant maliciously indicted the plaintiff for wilful and corrupt perjury, without describing more particularly the circumstances under which the alleged perjury was supposed to have been committed.^f

Where the charge was laid before a magistrate the statement of it should be taken from the magistrate's warrant, or from the examination of the defendant on oath. If the facts be stated specially, they must be proved as laid; but if the substance only, of the charge be stated, a variance will not be fatal unless it be a different charge. Where the declaration alleged that the defendant charged the plaintiff before a justice with assaulting and beating him, and the charge in fact was for assaulting and striking; it was held that as the declaration did not profess to describe the warrant, and had stated the charge correctly, in substance, the variance was not material.^g An averment of the day of the original trial should correspond with the record of the acquittal.^h A declaration in an action for a malicious prosecution, which alleges that the defendant charged the plaintiff with felony, is supported by

Description of the court.

*1297
A statement of the substance of the charge will be sufficient.

^a 1 Saund. 242, *a*.

^b Saxton v. Castle, 1 N. & Perr. 661.

^c Woodford v. Ashley, 11 East, 508.

^d Leigh v. Webb, 5 Esp. 165.

^e Bushby v. Watson, 2 Bl. 1050.

^f Pippet v. Hearn, 1 D. & R. 366. 5 B. & A. 634. (7 Eng. C. L. 217.)

^g Bine v. Moore, 5 Taunt. 187. (1 Eng. C. L. 69.) And see Davis v. Nook, 1 Stark. 377. (2 Eng. C. L. 434.) Freeman v. Arkill, 2 B. & C. 494. (9 Eng. C. L. 159.)

^h Pope v. Foster, 4 T. R. 590.

evidence that the defendant stated to the magistrate that he had been robbed of specific articles, and that he suspected and believed, and had good reason to suspect and believe, that the plaintiff had stolen them.^a In an action for a malicious arrest it is necessary to state the writ.^b In an action for maliciously holding to bail in an inferior court, which has no jurisdiction, the declaration must aver the *scienter* of the defendant of the want of this jurisdiction.^c

Averment
of the ter-
mination
of the for-
mer suit.

The declaration should show that the former prosecution or suit was legally determined,^d though the omission will be aided by verdict.^e And if the proof of the determination of the proceedings does not correspond with the allegation, it will be a fatal variance. As where the declaration alleged, "that the plaintiffs in that action did not prosecute their suit, but therein made default, whereupon it was considered that the said plaintiffs should take nothing by their bill, and the pledges to prosecute be in mercy," &c.; it was held, that this being an allegation of nonsuit, was not proved by a rule to discontinue, and that the variance could not be amended.^f

*1298

If the mode of determining the former action be stated, and *the statement conclude, "whereupon and whereby," the said suit was ended and determined, and there be a plea traversing that allegation, it must be proved as alleged.^g It seems, however, to be sufficient to state generally, "that the suit was ended and determined," or "that the defendant was acquitted," without stating the manner how.^h The special damages, if any were sustained by the plaintiff, should be stated in the declaration, otherwise he will be precluded from giving evidence of such at the trial.ⁱ Where the plaintiff declared that the defendant maliciously, and without probable cause, preferred an indictment against the plaintiff, it was held to be sufficient to show that some of the charges contained in the indictment were preferred maliciously and without probable cause, though there were good grounds for the rest.^j

Averment
of special
damage.

Pleading.

In this action, the plea of *not guilty* puts in issue the fact of prosecution and the want of probable cause.^k

^a Davis v. Noak, 1 Stark. 377. (2 Eng. C. L. 434.)

^b Gadd v. Bennett, 5 Price, 540.

^c Goslin v. Wilcock, 2 Wils. 309.

^d As to what constitutes a legal determination, see *ante*, 1294.

^e 1 Saund. 228, b. 2 Ch. Pl. 407.

^f Webb v. Hill, M. & M. 253. (14 Eng. C. L. 403.)

^g Combe v. Capron, 1 M. & Rob. 398.

^h Witherden v. Emden, 1 Camp. 295. See Hunter v. French, Willes, 517. 2 Ch. Pl. 407..

ⁱ Peake, 46.

^j Read v. Taylor, 4 Taunt. 617.

^k Cotton v. Brown, 1 H. & W. 419. 3 Ad. & Ell. 312. (30 Eng. C. L. 100.) 4 N. & M. 831. But in an action for maliciously proceeding to outlawry, not guilty puts in issue the probable cause, only, and not the reversal of the outlawry. Drummond v. Pigoux, 2 Bing. N. C. 114. (29 Eng. C. L. 278.) 1 Hodges, 190.

SECTION VI.

EVIDENCE.

THE plaintiff must prove all the material averments in the declaration which are not admitted by the pleadings. The fact of the prosecution and acquittal may be proved by the production of the record, or of an examined copy of it.^a And though the record, or a copy of the indictment for *felony* cannot be *regularly* procured without the order of a judge, or the fiat of the attorney-general, yet if it be offered in evidence, it is no objection to its admissibility that no such order or fiat had been obtained.^b Some proof should be given of the identity of the *plaintiff as the party prosecuted, and of the defendant as the prosecutor. The proper mode of proving the latter fact is to show that he employed the attorney or agent to conduct the prosecution, or was otherwise active in forwarding it; it has been held, that a grand juror may be called to prove that the defendant was prosecutor.^c In an action on the case against a party for causing the arrest of a person privileged from arrest, (*e. g.* a witness attending on his subpoena, or a practising attorney,) thereby putting him to the expense of finding bail and procuring his discharge by order of a judge; it was held, that the plaintiff should show that his imprisonment at the particular time in question took place by some act of the defendant, and that he knew or recognised the circumstances accompanying it, and also knew that the party arrested was privileged at that time.^d It is for the jury to determine from the evidence who the prosecutor was.^e If the proceeding was by preferring a charge before the magistrate, the magistrate or his clerk should be served with a *subpœna duces tecum*, to produce the proceedings; the warrant upon which the plaintiff was arrested should also be produced, and the arrest and discharge of the plaintiff regularly proved.^f

*1299

Where it appeared that the warrant was lost, and there was no evidence of any information having been taken, parol evidence of the contents of the warrant was received.^g

In an action for a malicious arrest, the plaintiff should be prepared to prove (unless where the pleadings dispense with

^a B. N. P. 13. *Kirk v. French*, 1 Esp. 81. *Morrison v. Kelly*, 1 Bl. 385.

^b *Leggatt v. Tollervey*, 14 East, 302. *Jordan v. Lewis*, 2 Stra. 1122. *Caddy v. Barlow*, M. & R. 275. See *Brown v. Cumming*, 10 B. & C. 70. (21 Eng. C. L. 27.) Where the right of a person, acquitted on the charge of a felony, to a copy of the indictment is discussed, but not decided. In cases of *misdemeanor* the defendant is entitled as a matter of right to a copy of the record. *Morrison v. Kelly*, *supra*.

^c *Sykes v. Dunbar*, S. N. P. 1066.

^d *Stokes v. White*, 4 Tyr. 786. 1 C. M. & R. 223.

^e 2 Stark. Ev. 490.

^f 3 Stark. Ev. 493.

^g *Newsam v. Carr*, 2 Stark. 69. (3 Eng. C. L. 249.)

it) the affidavit made by the defendant, which may be done by producing the original, or an examined copy.^a He must also prove an examined copy of the writ, and return the warrant of the sheriff, made by virtue of the writ, and the arrest and detention under it.^b The return made by the sheriff is evidence of the fact therein stated.^c The plaintiff must also give some evidence of malice, and the want of probable cause where the facts are disputed.^d Proof of an acquittal for want of prosecution, is not even *prima facie* evidence of malice;^e nor is abandoning the prosecution evidence of the want of probable cause.^f There must be some evidence of the want of probable cause, before the defendant can be called upon to justify his conduct, for it must not be presumed that any one has acted illegally;^g but the jury *may* infer malice from the want of probable cause.^h

In an action by *A.* for the malicious prosecution by *C.* of an indictment against *A.* and *B.*, evidence of the misconduct of *C.* towards *B.*, after his apprehension, tending to show the bad motives of *C.*, is admissible.ⁱ

When the plaintiff has made out a *prima facie* case, the defendant may rebut it by giving evidence of probable cause, or of the absence of malice. In one case it was held, that the defendant might give evidence of the plaintiff's bad character.^j But in a subsequent case, such evidence was rejected, as it could afford no proof of probable cause.^k

Where a cause had been referred, and the arbitrator, upon the inspection of the plaintiff's books and examination of the parties, found that the plaintiff had no cause of action; in an action for malicious prosecution, it was held, that the arbitrator could not be called as a witness to prove those facts, as he had access to documents which the defendant could not be compelled to produce.^l

*1301 The plaintiff should give evidence of the length of his imprisonment, the prejudice to his reputation by the scandal, or the expenses incurred in consequence of the prosecution or arrest, as the foundation of the damages to which he is en-

^a B. N. P. 14. *Casburn v. Reed*, 2 Moore, 60. (4 Eng. C. L. 404.) *Webb v. Heme*, 1 B. & P. 289.

^b 2 Stark Ev. 497. B. N. P. 234.

^c *Gyfford v. Woodgate*, 11 East, 297. Where the sheriff's return stated a detainer only, Mr. Justice Littledale held it to be sufficient evidence of an arrest. *Whalley v. Pepper*, 7 C. & P. 510. (32 Eng. C. L.) To constitute an arrest, there must be a corporeal touch, or a capacity in the officer to arrest, and submission by the party. B. N. P. 62. *Arrowsmith v. Le Mesurier*, 2 N. R. 311. See *ante*, 1290.

^d See *ante*, 1290.

^e *Purcell v. Macnamara*, 9 East, 361.

^f *Inclendon v. Berry*, 1 Camp. 203.

^g Per Tindal, C. J., in *Willans v. Taylor*, 6 Bing. 187. (19 Eng. C. L. 47.)

^h See *ante*, 1291.

ⁱ *Caddy v. Barlow*, 1 M. & R. 275.

^j *Rodriguez v. Tadmire*, 2 Esp. 721.

^k *Newsam v. Carr*, 2 Stark. 70. (3 Eng. C. L. 249.)

^l *Haberahon v. Troby*, 3 Esp. 38.

titled.^a But he cannot recover damages for imprisonment after goal delivery, as it is his own fault to continue in prison.^b In an action for a malicious arrest, the plaintiff cannot recover in damages for more than taxed costs, which he has incurred.^c

PARTICULARS OF DEMAND AND SET OFF.

WHEN the declaration does not disclose the particulars of the plaintiff's demand, and they are not delivered with the declaration or notice thereof, the defendant may, by summoning the plaintiff before a judge, obtain an order, before appearance for a particular of his demands in writing.^d And so where the defendant pleads a set-off for goods sold, &c., the plaintiff may obtain an order for a delivery of the particulars by the defendant.^e The court will not compel a plaintiff suing for the breach of an agreement, and assigning, by way of special damage, that he has incurred certain expenses, to furnish particulars of such special damage.^f

When the court will order a delivery of particulars.

By R. T. T. 1 W. IV, reg. 2, it is ordered, that "with every declaration, if *delivered*, or with the notice of declaration, if *filed*, containing counts in *indebitatus assumpsit* or *debt* on simple contract, the plaintiff shall deliver *full* particulars of his demand under these counts, where such particulars can be comprised within three folios; and where the same cannot be comprised in three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios; and to secure the delivery of particulars in all such cases, it is further ordered, that if any declaration or notice shall be delivered without such particulars or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver."^g

^a B. N. P. 13.

^b Sayer, 87.

^c Sinclair v. Eldred, 4 Taunt. 7. Webber v. Nicholas, R. & M. 419. (21 Eng. C. L. 479.) See Jenkins v. Biddulph, 4 Bing. 160. (13 Eng. C. L. 389.) Lord Ellenborough held, that the plaintiff was entitled to his costs as between attorney and client. Sandback v. Thomas, 1 Stark. 306.

^d R. H. T. 2, W. IV, reg. 1, s. 47.

^e Tidd's Prac. 9th ed. 596. New Prac. 304. It is no objection to the use of particulars of set off, that they are pleaded in a different court from that in which the action is brought, if they have not been delivered pursuant to a judge's order. Lewis v. Hilton, 5 Dowl. 267.

^f Retallick v. Hawkes, 1 Mees. & Wels. 573.

^g R. T. T. 1 W. IV, reg. 2. This rule is not imperative on the plaintiff to deliver particulars, or a statement of his demand with the declaration or notice thereof, though if he omit to do so, he will not be allowed for them in costs, if afterwards called for and delivered. Tidd, N. P. 302.

A copy of the particulars should be annexed to the record. A copy of the particulars of the plaintiff's demand, and of the defendant's set off, if any, should be annexed to the record at the time it is entered with the judge's marshal.^a And when a copy of the particulars of demand is so appended, it is not necessary to prove the delivery of it to the defendant.^b

A particular of demand is only necessary to explain a common count; the defendant therefore is not entitled to particulars on a count for a bill of exchange,^c or on a special count.^d And if any such count be contained in the same declaration with a common count, the delivery of particulars on the latter only will not preclude the plaintiff from recovering on the former.^e

Effect of a misstatement in the particulars.

The bill of particulars should contain an account of the items of the demand, and specify the transaction upon which the claim arose. If, however, it conveys to the defendant the requisite information, however inaccurately it may be drawn up, it is sufficient.^f A variance or mistake which is not calculated to mislead the defendant, will not prevent the plaintiff from recovering. Thus, a mistake in the statement of the day of the month on which the work and labor, which was the subject of the action, was performed, has been held to be immaterial.^g So a mis-statement of the situation of the premises, in debt for rent.^h So *disbursements* by the plaintiff on journeys made by him upon the defendant's business, have been held to be recoverable under particulars "for cash advanced."ⁱ So where the particulars were for "chalk," and the evidence was of "caulk."^j So where the particulars were "for composing and printing a newspaper," and the proof was, that the plaintiff had "let out men, presses, and type for the printing of a newspaper," it was held sufficient, no objection having been taken to the variance at the trial.^k So where the particulars described the plaintiffs as "brewers," and it appeared that they were "spirit dealers," it was held to be an immaterial variance.^l Though the particulars are merely for "a promissory note," the plaintiff may recover interest.^m

But where the particulars stated that the action was "for the amount of stakes deposited in the hands of the defendant by plaintiff and R., and won by the plaintiff of R.;" it was held,

^a *Id.* Tidd's N. Prac. 304.

^b *Macarthy v. Smith*, 8 Bing. 145. (21 Eng. C. L. 253.)

^c *Brooks v. Farrow*, 3 Bing. N. C. 291. (32 Eng. C. L.)

^d *Day v. Davies*, 5 C. & P. 340. (24 Eng. C. L. 350.) *Stannard v. Ullithorne*, 3 B. N. C. 326. (32 Eng. C. L.)

^e *Cooper v. Amos*, 2 C. & P. 267. (12 Eng. C. L. 124.) *Day v. Davies*, 5 C. & P. 340. (24 Eng. C. L. 350.)

^f *Day v. Bower*, 1 Camp. 69, n.

^g *Milwood v. Walter*, 2 Taunt. 294.

^h *Davies v. Edwards*, 3 M. & S. 380.

ⁱ *Harrison v. Wood*, 8 Bing. 371. (21 Eng. C. L. 323.) See *Fisher v. Wainwright*, 1 M. & Wels. 480.

^j *Spencer v. Bates*, 1 Gale, 108.

^k *Bagster v. Robinson*, 9 Bing. 77. (23 Eng. C. L. 370.)

^l *Lambirth v. Roff*, 8 Bing. 411. (21 Eng. C. L. 338.)

^m *Blake v. Lawrence*, 4 Esp. 147.

that the plaintiff could not recover the amount of his own stake, on proof that he had re-demanded it of the defendant before the event; for the particular was calculated to mislead, it might have induced the defendant to bring witnesses to show that the plaintiff had lost the wager.^a So where the particulars specified the demand to be for a promissory note which, for want of a stamp, could not be received in evidence, it was held, that the plaintiff was precluded from giving evidence of the consideration for the note.^b So where the particulars stated the demand to be, for goods sold to the defendant, it was held that the plaintiff could not give evidence of goods sold and delivered by the defendant as agent for the plaintiff.^c So a particular for "a beast sold and delivered, 13*l.* 10*s.*," is not supported by evidence that the defendant admitted to a third person that he owed the plaintiff 13*l.* 10*s.*^d

If a bill of particulars specifies the transaction upon which the plaintiff's claim arises, it need not specify the technical description of the right which results to the plaintiff out of that transaction. Therefore, in an action by a carrier, who had misdelivered goods to the defendant, the amount of which he was obliged to pay to the real owner; it was held that he might recover on a count for money had; though his particular was for "17 firkins of butter, 55*l.* 6*s.*."^e

If a plaintiff deliver one particular under an order, and afterwards a second without an order, he cannot give evidence of any demand in the second, which was not included in the first.^f But he may recover a demand in his particular, although he may have omitted to include such demand in a bill previously sent to the defendant.^g

Where a judge's order directed a defendant to give particulars of his set off with *dates*, and the only dates in the particulars delivered in obedience to the order, were "from January 1828, to January 1834," Tindal, C. J., held, that it was not a sufficient compliance with the order, and would not permit the defendant to give evidence of his set off.^h

It is a general rule, that the plaintiff is bound by the particulars of his demand; but, although he is precluded from giving evidence of any demand not contained in his particulars, yet he may take advantage of any evidence produced by the defendant to increase his demand; as where the plaintiff, in an action against his partner, confined his particular to a separate account, and the defendant gave in evidence a general account, from which it appeared that more was due to the plaintiff than he claimed by his particular; held, that the plaintiff was entitled to recover the sum which by the defendant's evidence appeared to

The plaintiff is bound by his particulars.

^a Davenport v. Davis, 1 Mees. & Wels. 570. 2 Gale, 119.

^b Wade v. Beasley, 4 Esp. 7.

^c Holland v. Hopkins, 2 B. & P. 243.

^d Breckon v. Smith, 1 Ad. & Ell. 488. (38 Eng. C. L. 125.)

^e Brown v. Hodgson, 4 Taunt. 189.

^f Brown v. Watts, 1 Taunt. 353.

^g Short v. Edwards, 1 Esp. 374.

^h Swain v. Roberts, 1 M. & Rob. 452.

be due to him.^a Where the particular contained items, as due from the defendant and his partner, who was not sued, and the defendant pleaded the non-joinder in abatement; it was held, that the plea was sustained by the particulars, by which the plaintiff was bound, though it appeared at the trial that part of the demand was due from the defendant alone.^b

The plaintiff should state the precise sum due.

The plaintiff should state in his particulars the precise sum which he seeks to recover; if there has been an account between the parties, he should state the balance, and not the amount on the debtor side only.^c But he need not specify the sums received by him on account, it is sufficient if he states the balance.^d But though the rule requires a statement of the balance, it seems that the court cannot compel the plaintiff to give credit for sums received, so as to enable the defendant to pay the balance into court.^e

Quære—Whether a payment admitted by the particulars can be given in evidence in bar of the action, without pleading it?

Where the plaintiff, in his bill of particulars, gives credit for sums received on account, a difference of opinion prevails, whether it should be considered as *evidence* of payment only, or whether it should have the same operation as a *plea* of payment not traversed, or in other words, whether the defendant can avail himself of the admission in the particulars, in bar of the action, without pleading payment of the sum admitted. In *Coates v. Stevens*,^f Parke B., expressed a strong opinion, that there was no necessity to plead payment of a sum which was admitted by the particulars. But where, in an action of debt, the plaintiff's particulars were as follows: "For a cart 5*l.*, deduct paid by B. 1*l.* 13*s.*, balance 3*l.* 7*s.*," and the defendant pleaded, "except as to 3*l.* 7*s.*, *nunquam indebitatus*, and a payment of 3*l.* 7*s.* into court;" at the trial he proposed to prove the payment of 1*l.* 13*s.*; but Tindal, C. J., refused to receive the evidence, as there was no plea of payment, and the plaintiff had a verdict with nominal damages; on a motion for a new trial, on the ground that the admission in the particular precluded the necessity of pleading it, the *dictum* of Parke, B., as above was cited. "*Coates v. Stevens*," said Tindal, C. J., "was an action of assumpsit, which was very different.^g Here you say you were never indebted to the plaintiff. Strong as the admission in the particulars is, it is no more than evidence of payment; but it cannot be set up in bar of the action." "The plea of *nunquam indebitatus*," said Bosanquet, J.,

^a *Hurst v. Watkins*, 1 Camp. 68.

^b *Colson v. Selby*, 1 Esp. 151.

^c *Adlington v. Appleton*, 2 Camp. 410. R. T. T. 1 W. IV, *ante*. "The case of *Adlington v. Appleton*, has been misunderstood, it is supposed to be a decision that the plaintiff must give the items in reduction of his demand, that is not so, he must state the balance, but he need not show how the balance is made up." Per Patteson, J., 1 H. & W. 528, *infra*.

^d *Smith v. Eldridge*, 6 N. & M. 408. 1 H. & W. 527. But see *Mitchell v. Wright*, 1 Esp. 280.

^e *Penprase v. Crease*, 1 M. & Wels. 36. *Randall v. Ikey*, 4 Dowl. 682.

^f 2 C. M. & R. 118. S. C. but not S. P. 1 Gale, 75.

"was framed in order that payment might be pleaded. Here the debt was once due."^a

The question was subsequently raised in an action of assumpsit for use and occupation, for 105*l.*, in which the particulars of demand were as follow: "the plaintiff seeks to recover in this action the sum of 52*l.* 10*s.*, being the balance of one year's rent, due from the defendant," &c.: plea, as to all but 52*l.* 10*s.*, "parcel of the moneys in the declaration mentioned, *non assumpsit*, on which the plaintiff took issue; as to 52*l.* 10*s.* residue, payment, as to which the plaintiff entered a *nolle prosequi*. At the trial, the defendant proved payment of all the arrears of rent, but it was objected for the plaintiff, on the authority of the preceding case, that he was nevertheless entitled to a verdict for nominal damages on the record as it stood. And of this opinion was the court above, on the ground that the plea of payment must be understood as referring to the sum admitted in the particulars. "We do not feel it necessary," said Parke, B., in delivering the judgment of the court, "to decide whether the defendant was bound to plead payment, in order to avail himself of the sum admitted in the particulars, as decided in *Ernest v. Brown*; for we think, that without relying on that case, we must construe the plea as intended to apply to the payment admitted. To avoid similar questions in future, the obvious course which ought to be pursued in like cases, is for the plaintiff to aver the part payment in the declaration, or to insert in the declaration the real amount which the plaintiff seeks to recover."^b After this came another action of assumpsit, in which the particulars contained a claim for wages, at 15*s.* a week, amounting to 148*l.*, and gave credit for 70*l.*; plea, *non assumpsit*. At the trial, the defence was, that the contract was for 7*s.* a week only, and that at that rate the defendant had paid the full amount; to prove the payment he put in the particulars, which admitted payment to the amount of 70*l.*; the jury found a verdict for the defendant. On a motion for a new trial, on the ground that, as there was no plea of payment, the particulars should not have been received in evidence; or at all events, that they should go in reduction of damages only; the court held, that as the latter point was not taken at the trial they could not entertain it, and as to the former, that the evidence had been properly admitted. Parke, B., said, that if the latter point had been taken at the trial, they would have to consider whether a payment admitted by the particulars must be pleaded. He should have entertained little doubt on that subject were it not for the case of *Ernest v. Brown*; he had a difficulty in understanding the distinction taken in that case, between debt and assumpsit, and

^a *Ernest v. Brown*, 3 Bing. N. C. 674. (32 Eng. C. L.) 3 Hodges, 79.

^b *Nicholl v. Williams*, 2 Mees. & Wels. 760.

he was not yet satisfied that the opinion which he expressed in *Coates v. Stevens* was wrong.^a

The preceding cases, though apparently conflicting, may (with the exception of the dictum of Parke, B.,) be easily reconciled, if viewed in connection with other decisions. If an admission in the particulars be considered only as evidence of payment, as laid down by Tindal, C. J., in *Ernest v. Brown*, it follows from the case of *Belbin v. Butt*,^b that, without a plea of payment, the defendant cannot avail himself of it, in an action of *debt*; whereas *Shirley v. Jacobs*^c is an authority to show that in *assumpsit* the admission may be received in evidence in reduction of damages, without a plea of payment; so that these cases have established the distinction taken by the court in *Ernest v. Brown*, between debt and *assumpsit*. It is observable, that before the new rules, it had been held, that if the defendant availed himself of an admission in the particulars in order to show payment, it should be considered as *his* evidence, so as to entitle the plaintiff's counsel to a reply.^d And the new rules do not appear to have made any alteration in that respect; for though they require the particulars of demand to be annexed to the declaration, still, as we have seen,^e the rule is not imperative on the plaintiff, and even if he does append the particulars to the record, they are not to be considered as incorporated with the declaration.^f

An objection to a bill of particulars on the ground of variance,^g or of its inadmissibility in evidence,^h should be taken at the trial. Payment of money into court does not operate ^aas an admission of the particulars of demand,ⁱ nor of a liability on all the contracts stated in the particulars.^j

^a *Kenyon v. Wakes*, 2 Mees. & Wels. 764. See *Booth v. Howard*, 5 Dowl. 438, *ante*, 175.

^b 2 Mees. & Wels. 422. 1 Mur. & Hur. 70, *ante*, 716.

^c 9 Bing. N. C. 88. (29 Eng. C. L. 266.) 1 Hodges, 214, *ante*, 198.

^d *Rymer v. Cook*, M. & M. 86, (29 Eng. C. L. 257,) *post*, 1307.

^e *Ante*, — n. d.

^f *Booth v. Howard*, 1 W. W. & Dav. 54. 5 Dowl. 438, *ante*, 175. Patteson, J., laid down in this case, that the particulars of demand were for the benefit and information of the defendant, and that he need take no notice of them, as he was not bound to look out of the record.

^g *Bell v. Puller*, 2 Taunt. 285.

^h *Blackburne v. Scholes*, 2 Camp. 341.

ⁱ *Kenyon v. Wakes*, *supra*.

^j *Booth v. Howard*, *supra*, *ante*, 174.

*CHAPTER XIX.

PRACTICE IN TRIALS AT NISI PRIUS.

	PAGE
I. Hearing counsel.	
II. Amending the record.	1309
III. Judge's certificate respecting costs.	1316
IV. Speedy execution.	1321

SECTION I.

HEARING COUNSEL.

THOUGH points of practice do not strictly fall within the design of this work, yet it is thought expedient to notice, in this place, some of the incidents of trials at *nisi prius*, and first of hearing counsel.

When the jury are sworn, the junior counsel for the plaintiff opens the pleadings,^a after which, if the proof of the issue rest upon the plaintiff, his *senior* or leading counsel states his case to the jury, and after having examined witnesses in support of it, counsel for the defendant are heard, and if they call any witnesses, the plaintiff's counsel are entitled to the general reply.^a Where there are several issues, some of which are incumbent on the plaintiff and others on the defendant, it is usual for the plaintiff to begin and prove those which are essential to his case, and the defendant then does the same; and afterwards the plaintiff is entitled to go into evidence to controvert the defendant's affirmative proofs; the defendant's counsel is then entitled to a reply upon such evidence in support of his own affirmative, and the plaintiff's counsel to a general reply.^b

*By a general resolution of all the judges, the plaintiff is entitled to begin in cases of slander, libel, and other actions for personal injuries, where the plaintiff seeks to recover actual damages of an unascertained amount, although the affirmative of the issue may, in point of form, be with the defendant.^c Therefore, where in an action for false imprisonment there was a plea of justification and no general issue, and a replication *de injuriâ*, it was held, that the plaintiff was entitled to begin.^d So where to an action for a breach of promise of marriage the

*1303

When the plaintiff's counsel is entitled to begin.

^a Tidd, N. P. 501.^b *Id.* 502. Jackson v. Hesketh, 2 Stark. 521. (3 Eng. C. L. 456.) 1 Stark. Ev. 382.^c Carter v. Jones, 6 C. & P. 64. (25 Eng. C. L. 283.) 1 M. & Rob. 281.^d Atkinson v. Warne, 6 C. & P. 687. (25 Eng. C. L. 599.)

only plea was that the defendant had, after the promise, conducted herself in a lewd and unchaste manner, &c.; it was held that the plaintiff had a right to begin.^a

When the plaintiff does not go for unliquidated damages, the party on whom the affirmative issue lies has a right to begin.

But if the plaintiff does not go for unliquidated damages, the case does not fall within the above rule, and the party on whom the affirmative issue lies has a right to begin. Therefore, where in an action of *debt* for a penalty of 50*l.* for carrying the plaintiff to a prison under mesne process, within twenty-four hours, the defendant pleaded that it was by the plaintiff's own consent; replication, that the plaintiff did not consent; held, that on these proceedings the defendant should begin, as the plaintiff did not go for unliquidated damages.^b And where in covenant to recover damages for the non-performance of an agreement under seal, the defendant pleaded only that the deed was obtained by fraud and covin; it was held, that the affirmative of the issue being upon him, his counsel had a right to begin, "because," said Tindal, C. J., "the damages were not a matter of calculation."^c

In considering, however, which party ought to begin, it is not so much the form of the issue which is to be considered as the substance and effect of it; and the judge will consider what is the substantial fact to be made out, and on whom it lies to make it out. Therefore, in an action of covenant for not repairing, &c., *if the defendant plead affirmative pleas he is in general entitled to begin.^d

*1304

Where any affirmative proof is on the plaintiff, to show what damages he is entitled to, he has a right to begin.^e The plaintiff has a right to begin, although by a rule of court the defendant is under an obligation to admit the plaintiff's case.^f

Where in assumpsit, the declaration stated that the defendant agreed to build houses according to a specification; breach, that he did not build according to the specification; plea, that the defendant did build according to the specification; held, that on this issue the plaintiff must begin, and prove that the defendant had not built according to the specification.^g

So, where in assumpsit for work and labor, the defendant pleaded that the promise was made to the plaintiff and *J. S.*, and not to the plaintiff alone; replication, that the promise was made to the plaintiff alone, and not to him and *J. S.*; held, that on this issue the plaintiff ought to begin.^h

^a *Harrison v. Gould*, 7 C. & P. 580. (32 Eng. C. L.)

^b *Silk v. Humphrey*, 7 C. & P. 14. (32 Eng. C. L.) And see *Burrell v. Nicholson*, 1 M. & Rob. 304.

^c *Reeve v. Underhill*, 6 C. & P. 773. (25 Eng. C. L. 644.)

^d *Lewis v. Wells*, 7 C. & P. 221. (32 Eng. C. L.) *Soward v. Leggatt*, *id.* 613.

^e Per Lord Denman, C. J., in *Absolom v. Beaumont*, 1 M. & Rob. 441, *n.*

^f *Thwaites v. Sainsbury*, 5 C. & P. 69. (24 Eng. C. L. 216.) And see *Tuberville v. Patrick*, 4 C. & P. 557. (19 Eng. C. L. 526.)

^g *Smith v. Davies*, 7 C. & P. 307. (32 Eng. C. L.)

^h *Davies v. Evans*, 6 C. & P. 619. (25 Eng. C. L. 564.) On a plea in abatement for non-joinder of a co-defendant, the counsel for the plaintiff is to begin, since it was

But when the general issue or common plea in denial is not pleaded, but issue is joined on a collateral fact, the proof of which rests on the defendant, his counsel is entitled to begin.^a Therefore, where in an action on a bill of exchange by the indorsee against the acceptor, the defendant pleaded that it was an accommodation bill, and that a blank acceptance had been filled up, and applied in discharge of this and other bills; the plaintiff replied, that the defendant broke his promise without such cause as in that plea alleged; held, that on these pleadings the defendant was entitled to begin.^b So, where a defendant in assumpsit pleaded as to 20*l.* payment, and as to the residue, a set-off; held, that on these pleadings he must begin.^c So, *where in an action on a check, the defendant pleaded that there was no consideration for the check; and the plaintiff replied, that there was consideration; held, that on this issue the defendant must begin.^d

When issue is joined on a collateral fact, the proof of which rests on the defendant, he has a right to begin.

*1305

So where, in assumpsit on a bill of exchange by the indorsee against the acceptor, the only plea was that the bill had been altered after acceptance; held, that the defendant had a right to begin.^e So where in assumpsit for an unworkmanlike execution of a contract, the defendant pleaded that the work was properly done; held, that he was entitled to begin.^f

Where a mandamus to a rector to restore a parish clerk, the rector returned that the clerk was guilty of acts of intoxication and therefore he dismissed him; the clerk brought an action for a false return, and in his declaration recited the return, and negatived the allegations contained in it; the rector by his plea repeated the charges contained in the return; held, that on these pleadings, the defendant had the right to begin.^g

Where a defendant in replevin pleads property in a third person, and issue is taken thereon, he is entitled to begin.^h But where the defendant avowed for rent, and the plaintiff pleaded in bar an agreement to set off another sum against the rent, and issue was taken on that plea; it was held, that the plaintiff was entitled to begin.ⁱ In replevin, any issue in which the affirmative is on the plaintiff, gives him a right to begin.^j

Where in assumpsit on a bill of exchange, with a count on an account stated, the defendant pleaded payment on the bill and non assumpsit to the account stated; the plaintiff having

incumbent upon him to prove his damages. *Roby v. Howard*, 2 Stark. 555. (3 Eng. C. L. 472.)

^a Tidd, N. P. 502.

^b *Faith v. M'Intyre*, 7 C. & P. 44. (33 Eng. C. L.)

^c *Coxhead v. Huish*, 7 C. & P. 63. (33 Eng. C. L.)

^d *Mills v. Oddy*, 6 C. & P. 728. (25 Eng. C. L. 620.)

^e *Barker v. Malcolm*, 7 C. & P. 101. (32 Eng. C. L.)

^f *Amos v. Hughes*, 1 M. & Rob. 464.

^g *Bowles v. Neale*, 7 C. & P. 262. (33 Eng. C. L.)

^h *Colstone v. Hiscolbs*, 1 M. & Rob. 301.

ⁱ *Curtis v. Wheeler*, 4 C. & P. 196. (19 Eng. C. L. 340.) And see *Williams v. Thomas*, *Id.* 234. (19 Eng. C. L. 361.)

^j *James v. Salter*, 1 M. & Rob. 501.

offered no evidence on the account stated, the defendant was allowed to begin.^a So where to an action of trespass for breaking and entering the plaintiff's close, the defendant pleaded

*1306 "not guilty as to force, and justified as to the residue under a public right of way; held, that there being in fact but one issue, the affirmative of which lay on the defendant, his counsel was entitled to begin.^b

When the defendant is entitled to begin.

In general, when the general issue is not pleaded and the affirmative issue is on the defendant, he is entitled to begin. As where, in trespass for entering the plaintiff's dwelling-house and taking his goods, the defendant justified entering under proceedings in a commission of bankruptcy, and the replication took issue on the act of bankruptcy; it was held, that as the defendant did not plead the general issue, he was entitled to begin.^c So where the only plea was *liberum tenementum*.^d So where, in trespass, the defendant, a constable, justified without pleading the general issue; it was held, that his counsel, having admitted a demand of a copy and a perusal of the warrant, pursuant to 24 Geo. II, c. 44, he was entitled to begin.^e

Ejectment

In ejectment, if the defendant admits a *prima facie* title in the plaintiff, he has a right to begin. Where in ejectment by lessors, claiming under several descents from a particular ancestor, the defendant admitted all the descents except the first, and claimed under a will of this ancestor; held, that the defendant was entitled to begin.^f But the defendant's counsel has no right to the general reply, unless he admits the whole *prima facie* case of the lessor of the plaintiff; therefore, where the counsel for the defendant only admitted the pedigree of the lessor of the plaintiff, and his counsel proved the seisin of the ancestor, by receipt of rent, which case was answered by setting up a will, the validity of which was disputed by evidence on the part of the lessor of the plaintiff; it was held, that the defendant's counsel was not entitled to the general reply.^g Where in ejectment a defendant admitted the validity of a will

*1307 under "which the plaintiff claimed, but entitled himself under a codicil; held, that he had a right to begin.^h

If in ejectment by the heir at law against the devisee, the defendant will admit the lessor of the plaintiff to be heir, he has a right to begin.ⁱ But where each party claimed as heir at

^a Smart v. Rayner, 6 C. & P. 731. (25 Eng. C. L. 616.)

^b Jackson v. Hesketh, 2 Stark. 518. (3 Eng. C. L. 456.) Hodges v. Holder, 3 Camp. 366.

^c Cotton v. James, M. & M. 273. 3 C. & P. 505. (14 Eng. C. L. 415.)

^d Pearson v. Coles, 1 M. & Rob. 206.

^e Burrell v. Nicholson, 6 C. & P. 202. (25 Eng. C. L. 356.) 1 M. & Rob. 304.

^f Doe d. Wollaston v. Barnes, 1 M. & Rob. 386.

^g Doe d. Pile v. Wilson, 6 C. & P. 301. (25 Eng. C. L. 408.) 1 M. & Rob. 323.

^h Doe d. Tucker v. Tucker, M. & M. 536. (32 Eng. C. L. 377.)

ⁱ Doe d. Corbett (Bart.) v. Corbett, 3 Camp. 368.

^j Jackson v. Hesketh, 2 Stark. 519. (3 Eng. C. L. 456.)

law, and the real question was as to the legitimacy of the defendant, who proposed to admit that unless he were legitimate the lessor of the plaintiff was heir at law; held, that this admission did not entitle him to begin.^a

In assumpsit for goods sold and delivered, on a plea of cover- Where the plaintiff must go into the whole case in the first instance.
ture, if the plaintiff elect to begin, he must go into his whole case; but if the defendant admit that debt she is entitled to begin.^b It was formerly held, that if the defence was disclosed by the pleadings or by notice, the plaintiff's counsel was bound to go into the whole of his case in the first instance;^c but it is now established by a variety of cases, that, under such circumstances, the plaintiff need only in the first instance make out a *prima facie* case, and that he may afterwards give evidence in reply to the defendant's case; but he cannot give part of such evidence in the first instance, and reserve the remainder for the reply.^d

In general, the party who begins has the right to reply; but Right to reply.
if no evidence be adduced on behalf of the defendant, the plaintiff's counsel has no right to a reply; if, however, the defendant's counsel opens facts to the jury which he calls no witnesses to prove, it is in the discretion of the judge to permit the plaintiff's counsel to reply.^e It has been held, that where the defendant proved payment to the plaintiff by showing the particulars of demand, delivered under a judge's order, in which the plaintiff had credited the defendant, it entitled the plaintiff's counsel to a reply.^f When the defendant's counsel takes a legal objection, and calls evidence to support it, he is entitled to *reply to the plaintiff's answer to the objection,^g and if in re- *1308
plying he cites a case, the plaintiff's counsel will be allowed to observe on the case cited.^h

When the plaintiff's case has closed, the defendant's counsel Nonsuit.
may, if he think there is no evidence to go to the jury, ask the judge to nonsuit the plaintiff; but he forfeits his right to ask for a nonsuit if he has addressed the jury and examined witnesses.ⁱ But a plaintiff cannot be nonsuited without his consent.^j

^a Doe d. Warren v. Bray, M. & M. 166. (32 Eng. C. L. 378.)

^b Lacon v. Higgins, 3 Stark. 178. (14 Eng. C. L. 176.)

^c Rees v. Smith, 9 Stark. 31. (3 Eng. C. L. 230.)

^d Browne v. Murray, R. & M. 254. (31 Eng. C. L. 431.) Williams v. Davis, 1 C. & M. 464. Pierpoint v. Shapland, 1 C. & P. 447. (11 Eng. C. L. 445.) Tidd, N. P. 507.

^e Orevar v. Sodo, M. & M. 85. (32 Eng. C. L. 257.)

^f Rymer v. Cook, M. & M. 86. (30 Eng. C. L. 257.)

^g Arden v. Tucker, M. & Rob. 192.

^h Fairlie v. Denton, 3 C. & P. 103. (14 Eng. C. L. 235.) Power v. Barham, 7 C. & P. 356. (32 Eng. C. L.)

ⁱ Tidd, N. P. 506. Roberts v. Cross, 7 C. & P. 376. (32 Eng. C. L.)

^j Dewar v. Purday, 3 Ad. & Ell. 166. (30 Eng. C. L. 57.) 1 H. & W. 227. 4 N. & M. 633. Where at a trial leave was given to move to enter a nonsuit, and the trial proceeded, and the jury after long consideration disagreed upon their verdict; held, that the judge could not in the absence of the plaintiff and his counsel direct a

Where several defendants have separate counsel.

Where several defendants appear by separate attorneys and have separate counsel, if they are in the same interest, only one counsel can be heard to address the jury, and the witnesses are to be examined by one counsel on the part of all the defendants in the same manner as if the defence were joint.^a But the practice in this respect is not uniform; for in some instances counsel for each party has been allowed to address the jury.^b In a very recent case, however, Lord Abinger said that the rule was, when two defendants relied upon the same ground, only one counsel could address the jury, for there could not be a verdict for one defendant and against another.^c

There are some cases where a party conducting his own cause was allowed the assistance of counsel in arguing a point *1309 "of law;"^d but in a recent case, Mr. Baron Alderson refused to to hear counsel under such circumstances. "If," said he, "counsel be retained, he ought to appear in his proper place; and, though there are many precedents for counsel consenting to stand in such a position, the practice is highly objectionable."^e

SECTION II.

AMENDING THE RECORD.

GREAT expense having been often incurred, and a delay and failure of justice having frequently taken place at trials by reason of *variances* between writings produced in evidence and the recital thereof upon the record, in matters not material to the merits of the case, which could not be amended at the trial; to remedy which, it was enacted by 9 Geo. IV, c. 15, "that it shall and may be lawful for every court of record, holding pleas in civil actions, any judge sitting at Nisi Prius, and any court of oyer and terminer, and general gaol delivery in England
In case of a variance between any matter in print or

nonsuit. *M.* A motion for entering a nonsuit cannot be made, unless leave has been reserved for that purpose by the judge trying the cause. *Rickets v. Burman*, 4 Dowl. 578. *Tippetts v. Heane*, 4 Tyr. 772. Where the plaintiff's counsel, after the judge had begun to sum up, proposed to be nonsuited; it was held, that he could not move to set aside the nonsuit, notwithstanding the judge had expressed a strong opinion as to the effect of the plaintiff's evidence. *Simpson v. Clayton*, 2 Bing. N. C. 467. (29 Eng. C. L. 397.)

^a *Fidd*, N. P. 609. *Chippendale v. Mason*, 4 Camp. 174. *Perring v. Tucker*, M. & M. 291. *Doe d. Hogg v. Tindale*, M. & M. 314. 3 C. & P. 565. (14 Eng. C. L. 452.)

^b *Ridgway v. Phillips*, 1 C. M. & R. 415. *King v. Williamson*, 3 Stark. 162. (14 Eng. C. L. 175.)

^c *Mason v. Ditchbourne*, 1 M. & Rob. 462.

^d *Shuttleworth v. Nicholson*, 1 M. & Rob. 254.

^e *Mascatti v. Lawson*, 1 M. & Rob. 454. 7 C. & P. 32. (32 Eng. C. L.)

and Wales, the town of Berwick-upon-Tweed, and Ireland, if in writing such court or judge shall see fit to do so, to cause the record on which any trial may be pending before any such judge or court, in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print, produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs, if any, to the other party, as such judge or court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared: and in case such trial shall be had at *Nisi Prius*, the order for the amendment shall be indorsed on the postea, and returned together with the record, and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly."

"Under this statute it has been held, that where a judgment was stated on the record as in one court, and it appeared by the production of an examined copy to have been obtained in another, the judge at *Nisi Prius* might order the record to be amended.^a So where the date of a bill of exchange was misstated on the record.^b So where a promissory note was declared upon as a bill of exchange.^c So where there was a variance between a written contract and the statement of the contract on the pleadings.^d So where in an action for not obeying a subpoena, the declaration stated that the plaintiff caused to be left with the defendant a *copy of the writ of subpoena*: the court held, that the judge at *Nisi Prius* was warranted in ordering it to be amended as follows: "a copy of so much of the said writ of subpoena as related to the said defendant."^e

But where in replevin the avowant stated that the distress was for rent in arrear, and that the plaintiff held the lands on certain terms, and on the plaintiff's lease being put in, it appeared that he held them on different terms; Parke, J., refused to amend, on the grounds that the statute applied only to cases where some particular instrument was professed to be set out or recited in the pleading.^f And where there was a variance which could not have occurred, if common care had been exercised in drawing the declaration, Lord Tenterden refused to amend.^g So where, in an action for a libel, the writing was lost, and parol evidence of its contents was given; it was held, that the judge had no power to amend a variance which ap-

^a *Briant v. Eicke*, M. & M. 359. (22 Eng. C. L. 233.)

^b *Bentling v. Scott*, 4 C. & P. 24. (19 Eng. C. L. 257.) See *Parks v. Edge*, 1 C. & M. 429.

^c *Moilliet v. Powell*, 6 C. & P. 233. (25 Eng. C. L. 373.)

^d *Lamey v. Bishop*, 4 B. & Ad. 479. (21 Eng. C. L. 106.) 3 N. & M. 332.

^e *Masterman v. Judson*, 6 Bing. 224. (21 Eng. C. L. 281.)

^f *Ryder v. Malbon*, 3 C. & P. 594. (14 Eng. C. L. 470.)

^g *Jelf v. Oriel*, 4 C. & P. 22. (19 Eng. C. L. 257.)

peared between the evidence and the libel, as set forth on the record; the statute being confined to such variances only as appeared between any matter in *writing* or in *print* produced in evidence, and the recital thereof in the record.^a

*1311

The judge may order the amendment of any variance not material to the merits of the case

*The operation of the above statute being, as we have seen, confined to variances between matter in writing or print produced in evidence, and the record, it was deemed expedient to extend its principle, by 3 & 4 W. IV, c. 42, s. 23, whereby, after reciting the inconvenience which was produced by the power of amending the record at trial being so limited, it was enacted, "that it shall be lawful for any court of record, holding plea in civil actions, and any judge sitting at *Nisi Prius*, if such court or judge shall see fit so to do, to cause the record, writ, or document, on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedings on a *mandamus*, when any variance shall appear between the proof and the recital or setting forth, on the record, writ, or document on which the trial is proceeding, of any *contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge* not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared; and in case such trial shall be had at *Nisi Prius* *or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the postea or the writ, as the case may be, and returned together with the record or writ, and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be

*1312

necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had; provided that it shall be lawful for any one party who is dissatisfied with the decision of such judge at *Nisi Prius*, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued for a new trial upon that ground, and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet."

The court above will review the decision of a judge at *Nisi Prius* as to amending the record under 3 & 4 W. IV, c. 2.^a

A judge at *Nisi Prius* will now in general amend any variance which does not go at all to affect the matter really in dispute between the parties, and which is not likely to mislead the opposite party.^b Where a general warranty of the soundness of a horse was declared on, and a warranty "except in one foot," was proved, the judge allowed the declaration to be amended, the real dispute between the parties being, whether the horse was a roarer.^c So where, in trespass for breaking the plaintiff's close, called Clover Hill, the real name of the close appeared to be Clover Moor; the judge ordered the record to be amended by inserting the word Moor instead of Hill.^d So where a contract, by which *A.* guaranteed to *B.* the amount of a debt, to be contracted with *B.* by *C.*, was described in pleading as a promise to pay the debt to be so contracted, the court sanctioned an amendment ordered at *Nisi Prius*, by substituting "guarantie" for "pay."^e

Decisions
under the
preceding
act.

*So in case for a fraudulent misrepresentation on the warranty of a horse, an amendment of the misrepresentation charged may be made;^f and when a record is taken down to trial without any issue having been joined by the addition of a *similiter*, the defect may be cured by adding the *similiter* at the trial.^g So where the time of suing out the writ was not stated in the record; the court held, that the judge was warranted in allowing an amendment, by annexing the writ to the *Nisi Prius* record.^h

*1313

But where in trespass for taking "mirrors and handkerchiefs," the defendant justified the taking of the mirrors, but, by mistake, omitted to justify the taking of the handkerchiefs;

^a Pullen v. Leaven, 2 Gale, 132.

^b But if it appear probable that the amendment of a variance would prevent the defendant from pleading a good bar to the action, the judge will not allow it. Ivey v. Young, 1 M. & Rob. 546.

^c Hemming v. Parry, 6 C. & P. 590. (25 Eng. C. L. 550.)

^d Howell v. Thomas, 7 C. & P. 342. (32 Eng. C. L.)

^e Hanbury v. Elle, 3 Nev. & M. 438. 1 Adol. & Ellis, 60. (98 Eng. C. L. 39.)

^f Mash v. Densham, 1 M. & Rob. 442. ^g Dyson v. Warris, *Id.* 474.

^h Cox v. Painter, 7 C. & P. 767. (32 Eng. C. L.)

held, that this omission could not be amended on the trial.^a So if several defendants are sued in debt, and there be not evidence to fix them all, the judge will not allow the declaration to be amended by striking out the names of those whom the evidence does not affect.^b So, in an action for a libel, the judge will not order superfluous averments and *invenientes* to be struck out at the instance of the plaintiff.^c

In ejectment, an amendment has been made under the statute in the name of the parish, even though the action was brought for a forfeiture.^d But where the declaration in ejectment was
 *1314 "in a supposed joint demise by *A.* and *B.*, and it appeared in evidence that *A.* and *B.* had not such an interest that they could join in a demise to the nominal plaintiff; Taunton, J., at *Nisi Prius*, refused to amend the declaration by severing the demises, and the court would not allow the propriety of the refusal to be discussed in banc.^e

Judgment according to the right and justice of the case.

By 3 & 4 W. IV, c. 4, s. 24, it is enacted, "that the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued shall, if they shall think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case."

In order to entitle a party to have judgment entered for him

^a *John v. Currie*, 6 C. & P. 618. (25 Eng. C. L. 564.)

^b *Cooper v. Whitehouse*, 6 C. & P. 545. (25 Eng. C. L. 535.)

^c *Prudhomme v. Fraser*, 1 M. & Rob. 435.

^d *Doe d. Marriott v. Edwards*, 6 C. & P. 208. (25 Eng. C. L. 359.) 1 M. & Rob. 319. A declaration in ejectment has been amended, even after judgment and writ of error brought, by leaving out the word "tenement." *Doe d. Lawrie v. Dyball*, 1 M. & R. 330. 8 B. & C. 70. (15 Eng. C. L. 154.) So by adding a count on another demise even after three terms had elapsed, and the roll had been made up and carried in. *Doe d. Beaumont v. Armitage*, 1 D. & R. 173. (16 Eng. C. L. 30.) So in the time of the demise to prevent being barred; as where the day of the demise was laid before the title accrued. *Doe d. Rumford v. Miller*, 1 Ch. 536. *Doe d. Hardin v. Pilkinton*, 4 Burr. 2447. So by laying the demise anterior to the time of forfeiture, even after the cause was set down for trial. *Doe d. Rumford v. Miller, Adams, Eject.* 199. But an amendment was refused by altering it to a day subsequent to the delivery of the declaration. *Doe d. Foxlow v. Jefferies*, *Id.* 200. If the term demised to the plaintiff be likely to expire before trial, the court will at any time before trial enlarge it, upon payment of costs. Thus it was in one case enlarged after it had expired, twelve years, though a special jury was struck, and the parties had gone down to trial before the mistake was discovered. *Roe d. Lee v. Ellis*, 2 Bl. 940. So after a judgment in ejectment from Ireland affirmed, the court enlarged the term upon payment of costs, although the record was remitted to Ireland. *Vicars v. Haydon*, (in error,) Cowp. 841. But in a recent case it was considered too late to apply after the cause had been called on. *Doe d. Manning v. Hay*, 1 M. & Rob. 243.

^e *Doe d. Poole v. Errington*, 3 Nev. & M. 646. 1 Adol. & Ellis, 750. (28 Eng. C. L. 197.) 1 M. & Rob. 343.

under 3 & 4 W. IV, c. 42, s. 24, "according to the very right and justice of the case," he must apply to the judge who tries the cause, to amend the pleadings before the verdict has been pronounced; for the statute limits the right to make such applications to a period antecedent to the verdict.^a

Where the declaration in an action for an escape contained only one count, alleging an escape against the sheriff, and the evidence only proved a negligent omission of the sheriff's officer to make an arrest, when he had an opportunity; the judge, on an application for leave to amend, directed the jury to find the facts, specially reserving the question of the plaintiff's right to amend for the opinion of the court; and the jury having found a verdict for the defendant, but that fact in the affirmative; the court above ordered a verdict to be entered for the plaintiff, observing, that the defendant was not at all prejudiced in the conduct of his defence, by the course pursued by the plaintiff. The court further *said, that they had no power *1315 under the statute to impose any terms.^b

Where in an action on the case against the defendants as carriers, for negligence, it appeared from the evidence that the defendants, if liable at all, were liable as wharfingers, on a contract to forward. Just before the plaintiff's counsel commenced his reply, he applied to the judge to amend the declaration, which, however, the learned judge refused to do, but left it to the jury to say, whether there was a contract to forward or a contract to carry, and they found that there was a contract to forward. He then directed the verdict to be entered for the defendant, but the special finding to be indorsed on the postea, that the court might proceed thereon according to the 3 & 4 W. IV, c. 42, s. 24. The court allowed the amendment and granted a new trial on payment of costs, observing that the learned judge might have allowed the amendment, and postponed the trial to a future day, pursuant to s. 23, of that statute.^c

SECTION III.

JUDGE'S CERTIFICATE RESPECTING COSTS.

By the statute of Gloucester, (6 Ed. I, c. 1,) a plaintiff was entitled to costs in every case in which he obtained a verdict, however small the damages or trivial the injury sustained might be.^d But to prevent frivolous and trifling suits in the superior

^a *Serjeant v. Chafey*, 5 Ad. & Ell. 354. (31 Eng. C. L.) 9 H. & W. 273.

^b *Guest v. Elwes*, 9 H. & W. 34. 6 N. & M. 433.

^c *Parry v. Fairhurst*, 2 C. M. & R. 190. ^d *Wright v. Piggin*, 2 Y. & J. 548.

courts of law at Westminster, it was enacted by 43 Eliz. c. 6, s. 2, (extended to Wales and the Counties Palatine by 11 & 12 Will. III, c. 9, s. 1,) that, "if upon any action personal, brought in any of the king's courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges for the same court, and so signified or set down by the justices before whom the same shall be tried, that the

*1316 "debt or damages to be recovered therein shall not amount to the sum of forty shillings or above, the judges before whom any such action shall be pursued shall not award for costs to the plaintiff any greater costs than the amount of the debt or damages recovered, but less at their discretion."

The statute is confined to the judges of the courts at Westminster, and it empowers only the judge who tries the cause to give the certificate; therefore, in case of executing a writ of inquiry before a sheriff, the certificate cannot be granted;^a nor has a sheriff or judge of an inferior court to whom a cause is sent by writ of trial, under 3 & 4 W. IV, c. 42, s. 17, the power of certifying under this act.^b The certificate may be granted upon it at any time after the trial of the cause.^c The court above will not interfere where a judge has granted a certificate under this act, except upon the question whether he had power to grant such certificate, even though the judge may assign erroneous reasons for granting a certificate; for the court will presume that though the reasons assigned were erroneous, he had other sufficient motives.^d

Costs.

The court has no power to deprive a plaintiff of his costs in an action tried before the sheriff, though the damages given by the verdict be less than 40s.^e

Where, in trespass *quare clausum fregit*, and seizing the goods, the defendant pleaded not guilty, and that the goods were not the property of the defendant, the jury found for the defendant on the last issue, and for the plaintiff on the first, with 5s. damages, and the judge certified; held, that since Reg. Gen. H. T. 4 W. IV, r. 2, the case was not within the exception of this statute, which makes a judge's certificate inoperative, nor without the operation of 22 & 23 Car. II, c. 9, s. 136, and therefore, that the judge was authorised to grant the certificate; for the judge and the court are not bound by the form of the declaration; they may take into consideration the whole record, and the matter contested at the trial, in order to

^a Claridge v. Smith, 4 Dowl. 583.

^b Wardroper v. Richardson, 1 Ad. & Ell. 75. (28 Eng. C. L. 44.) 3 N. & M. 839. Jones v. Bond, 1 Mur. & Hur. 14.

^c Tidd, N. P. 529. Foxall v. Banks, 5 B. & A. 536. (7 Eng. C. L. 183.)

^d Cann v. Facey, 1 H. & W. 482. 5 N. & M. 405. 4 Ad. & Ell. 68. (31 Eng. C. L.) Twigg v. Potts, 4 Dowl. 266.

^e Story v. Hodson, 5 Dowl. 558. The court will compel a foreign potentate plaintiff to find security for costs in a cause arising out of commercial transactions. Emperor of Brazil v. Robinson, 5 Dowl. 522.

ascertain what the action is for, and what it concerns, and to *see whether the case was or was not within the operation of the statute.* But where in an action of trespass, *quare domum fregit*, with a count *de bonis asportatis*, the defendant pleaded the general issue, and accord and satisfaction, the question at the trial being whether a term of years had expired, and the jury found a verdict for the plaintiff, with damages under 40s.; it was held, that the judge had no power to certify, for the freehold might come in question.^a Where in an action of trespass against three defendants, two suffered judgment by default, and the jury found a verdict for the other defendant, and assessed the damages against the two at one farthing; held, that the judge might certify under the statute; for though the statute does not apply to writs of inquiry before the sheriff, and this was merely an assessment of damages, still the case was tried, so as to bring it within the words of the act.^b *1317

Where the plaintiff, in an action against an attorney, recovers less than 40s., the judge may certify under this statute, though the defendant could only be sued in a superior court.^c So where in an action against a husband for articles of dress supplied to his wife, the verdict was for 10s.; it was held, that the judge was warranted in certifying under this act.^d So where in an action for a libel, the defendant pleaded the general issue and two special pleas, and at the trial the jury found all the issues for the plaintiff, with 1s. damages; it was held, that the judge was warranted in certifying, to deprive the plaintiff of the costs of all the issues found for him, notwithstanding the rule of H. T. 4 W. IV, 55—7.^e

It has been held, that in an action for an assault and battery the judge may certify, even though the battery be proved.^f But in a recent case, where in trespass for assault, and false imprisonment and tearing the plaintiff's clothes, there was issue *upon a new assignment to a plea of son assault demesne. The jury found a verdict for the plaintiff, with one shilling damages; held, that the judge had no power to certify under this statute, for by the special plea of justification the battery was admitted, and actions of battery were within the exception in the act, and not within the general enactment. The case of Wiffin v. Kincard was distinguishable from this, for in that case there was no special plea. As the admission of the battery was equivalent to a certificate under 22 & 23 Car. II, c. 9, and *1318

^a Smith v. Edwards, 1 H. & W. 497. 4 Dowl. 631. Walker v. Robinson, 1 Wils. 93. Broadbent v. Woodhead, Tidd. 988.

^b Wright v. Piggin, 2 Y. & J. 544. And see Littlewood v. Wilkinson, 9 Price, 314.

^c Harris v. Duncan, 3 Ad. & Ell. 158. (39 Eng. C. L. 55.) 4 N. & M. 63.

^d Wright v. Nuttall, 10 B. & C. 492. (31 Eng. C. L. 131.)

^e Seaton v. Benedict, 5 Bing. 187. (15 Eng. C. L. 411.) 3 M. & P. 301.

^f Simpson v. Hurdie, 2 Mees. & Wels. 84. 5 Dowl. 84. 5 Dowl. 304.

^g Wiffin v. Kincard, 2 N. R. 471. Briggs v. Bowgin, 2 Bing. 333. (9 Eng. C. L. 423.) Emmett v. Lyne, 1 N. R. 255.

the case was not within the statute of Eliz., the plaintiff was entitled to his full costs, notwithstanding his certificate.*

Where a judge granted a certificate under this statute, and new facts, which did not appear at the trial, were subsequently laid before him on affidavit, he granted an order for annulling the certificate.†

In actions of assault, if the damages be under 40s., the plaintiff will not be entitled to recover more costs than damages, unless the judge certify.

By the statute 22 & 23 Car. II, c. 9, it is enacted, that "in all actions of trespass, assault and battery, and other personal actions, wherein the judge, at the trial of the cause, shall not find and certify under his hand, upon the back of the record, that an assault and battery was proved, or that the freehold or title of the land mentioned in the plaintiff's declaration, was chiefly in question: the plaintiff, in case the jury shall find the damages to be under the value of forty shillings, shall not recover more costs of suit than the damages so found shall amount unto."

This statute is confined to actions of assault and battery, and for local trespasses when it is possible for the judge to certify that the freehold or title to the land was chiefly in question.* The certificate required by this statute may be given at any time before final judgment.† The statute only restrains the court from awarding more costs than damages; the jury are not thereby prevented from giving what costs they please.‡

The statute does not apply where it does not appear on the record, or the judge cannot certify that the soil or freehold came in question;‡ therefore, where in trespass *quare clausum fregit*, since the new rules, the plaintiff had a verdict with 13s. damages on issue joined on a plea of not guilty; it was held, that he was entitled to full costs; for, on the plea of not guilty the soil or freehold could not come in question. Per Curiam, "Under the old plea of not guilty the defendant might have given in evidence that the freehold was his own. The effect of the new rules is to assimilate that plea to a special plea raising no question of title; and a series of decisions§ too strong to be overcome, have established that in such a case the plaintiff is entitled to costs without a certificate.¶ But where in trespass *quare domum fregit*, the defend-

* Bone v. Dawe, 5 Nev. & M. 230. 3 Ad. & Ell. 711. (30 Eng. C. L. 190.) 1 Har. & Woll. 311.

† Anderson v. Sherwin, 7 C. & P. 527. (32 Eng. C. L.)

‡ Tidd. N. P. 531. Stead v. Gamble, 7 East, 328. Johnston v. Stanton, 2 B. & C. 621. (9 Eng. C. L. 202.)

§ Butler v. Cozens, 11 Mod. 198. Tidd. N. P. 531.

¶ Id.

¶ Per Parke, B., 1 Gale, 302.

§ See 1 Saund. 300, f.

¶ Hughes v. Hughes, 2 C. M. & R. 663. 1 Gale, 302. There are cases, however, since the new rules, in which the title may come in question on a plea of not guilty, *ex. gr.* By 11 Geo. II, c. 19, s. 20, a landlord may, under the general issue, give a distress for rent, in evidence. Similar privileges are given by various local acts, all of which are preserved by the proviso in 3 & 4 W. IV, c. 42, in favor of the power of pleading the general issue when conferred by any statute, see 1 Gale, 303, n. The decision in Dunage v. Kemble, *infra*, throws some doubt upon the authority of this case, and see Howell v. Thomas, 7 C. & P. 342. (32 Eng. C. L.) If this case be

ant pleaded not guilty, and an entry to make a distress for rent arrears, and there was a verdict for the plaintiff with one farthing damages on the first plea, and for the defendant, on the second, it was held, that the plaintiff was not entitled to costs without a certificate.^a If the defendant pleads in such a manner as to bring the freehold in question on the face of the record, a certificate is unnecessary to entitle the plaintiff to costs.^b

An interest in the water of a pump appurtenant to a dwelling-house, is an interest in land; therefore, when such an interest comes in question in an action of trespass, the judge cannot certify to deprive the plaintiff of costs, though the damages be under 40s.^c

An action for mesne profits is within the statute, and if the plaintiff recover less than 40s., he will be entitled to no more costs than damages, without a certificate.^d So, if a defendant plead a justification in trespass, and the plaintiff without traversing it new-assigns a trespass not concerning his title, &c., on which issue is joined and found for him, with less than 40s. damages, he shall be entitled to no more costs than damages.^e *1320

Whenever the defendant lets judgment go by default,^f and justifies the *assault* and *battery*, a certificate is unnecessary to entitle the plaintiff to full costs.^g But if the defendant justifies *the assault only*, and the damages be under 40s., the plaintiff will be entitled to no more costs than damages, without a certificate.^h Where, however, in an action for assaulting, beating, wounding, ill treating, &c., the defendant pleaded the general issue, and justified as to the assaulting and ill treating only, by a plea of *molliter manus*, &c.; held, that the plea admitted a battery, and that a certificate was unnecessary to entitle the plaintiff to full costs.ⁱ

Whenever the consequential damage is laid as an aggravation of the trespass sued for, and the verdict is under 40s., the plaintiff can have no more costs than damages; therefore, where in trespass for assaulting, beating, and turning out of a room, *per quod*, the plaintiff was prevented from exercising the business of an attorney, the defendant pleaded not guilty; held, that the plaintiff having obtained a verdict for less than 40s., was entitled to no more costs than damages.^j Consequential damage.

not within the statute of Charles, it seems that it falls within the statute of Elizabeth, and that a judge may certify, to deprive the plaintiff of his costs, see *Smith v. Edwards, ante*, 1317.

^a *Dunnage v. Kemble*, 3 Bing. N. C. 538. (32 Eng. C. L.)

^b *Littlewood v. Wilkinson*, 9 Price, 314.

^c *Tyler v. Bennett*, 5 Add. & Ell. 377. (31 Eng. C. L.) 9 H. & W. 272.

^d *Doe v. Davies*, 6 T. R. 593. ^e *Gregory v. Omerod*, 4 Taunt. 98.

^f B. N. P. 329.

^g *Smith v. Edge* 6 T. R. 562. *Bone v. Dawe, ante*, 1318.

^h *Brennan v. Redmond*, 1 Taunt. 16. *Page v. Creed*, 3 T. R. 391.

ⁱ *Johnson v. Northwood*, 7 Taunt. 689. (9 Eng. C. L. 257.) 1 Moore, 420.

^j *Daubney v. Cooper*, 10 B. & C. 830. (31 Eng. C. L. 178.) 5 M. & R. 325.

So, where one count stated an assault on a man, and an assault on the horse on which he was riding, and the jury gave a verdict with general damages under 40s.; it was held, that the plaintiff should have no more costs than damages.^a

But where a declaration in trespass contained two counts, the first for assaulting the plaintiff and destroying a scraper affixed to his house; and the second for destroying the scraper; and the jury found a general verdict for him, damages 2s.; held, that he was entitled to his full costs.^b

So there shall be no more costs than damages in trespass for an assault, battery, and tearing the plaintiff's clothes, if the jury *find that the tearing was in consequence of the beating, and give less than 40s. damages.*

*1321
Malicious
trespass.

The stat. 8 & 9 W. III, c. 11, s. 4, enacts that "in all actions of trespass, wherein, *at the trial of the cause*, it shall appear and be certified by the judge, under his hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty, was wilful and malicious, the plaintiff shall recover, not only his damages, but his full costs."

Under this statute the judge may certify at any time between verdict and final judgment.^c The judge has a discretionary power to certify or not, according as it appears to him under the circumstances that the trespass was wilful and malicious.^d It is usual, however, to certify when it appears that the trespass was committed after *notice*.^e

SECTION IV.

SPEEDY EXECUTION.

Judge's
certificate
for a
speedy
execution.

THE 1 W. IV, c. 7, s. 2, enacts, "that in all actions to be brought in his Majesty's courts in either of the superior courts of law at Westminster, by whatever form of process the same may be commenced, it shall be lawful for the judge, before whom any issue joined in such actions shall be to be tried, in case the plaintiff or demandant therein shall become nonsuit, or a verdict be given for the plaintiff or demandant, defendant or tenant, to certify under his hand, on the back of the record, at any time before the end of the sitting or assizes, that in his

^a Banister v. Fisher, 1 Taunt. 357.

^b Reece v. Lee, 7 Moore, 269. (17 Eng. C. L. 74.)

^c Cotterill v. Tolly, 1 T. R. 655.

^d Wolley v. Whitby, 2 B. & C. 580. (9 Eng. C. L. 186.)

^e Good v. Watkins, 3 East, 495.

^f Reynolds v. Edwards, 6 T. R. 11. Swinnerton v. Jervis, 3 East, 497, n. Rudge v. Bond, *Id.*

Opinion execution ought to issue in such action forthwith, or at some day to be named in such certificate, and subject or not to any condition or qualification; and in case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by such verdict; in all which cases, a rule for judgment may be given, costs taxed, and judgment signed forthwith, and execution may be issued forthwith, or afterwards, according to the terms of such certificate, on any day in vacation or term; and the *postea* with such certificate, as a part thereof, shall and may be entered of record, as of the day on which the judgment shall be signed, although the writ of *Distringas Juratores*, or *Habeas Corpora Juratorum*, may not be returnable until after such day. Provided always, that it shall be lawful for the party entitled to such judgment, to postpone the signing thereof."

*1322

Under this statute the judges originally refused to certify for immediate execution in actions of *debt* on simple contract.^a But it is now settled that the statute applies to *all actions* where the judge thinks there ought to be immediate execution.^b A certificate for speedy execution has been granted in an action of *assumpsit* on a promissory note;^c and where the verdict was taken by consent, though the consent did not include any such terms.^d So in an action for *mesne* profits in ejectment.^e So in an action of *crim. con.*, where the plaintiff consented to be nonsuited.^f But where in debt on a bond the plaintiff did not assign breaches, and a verdict was found for him on a plea of *non est factum*, the judge refused to certify.^g

The statute applies to all actions.

Where in an action for goods sold there was a special demurrer to a count for an account stated, and a verdict for the plaintiff on another count, the judge certified on the plaintiff's undertaking to enter a *nolle prosequi* as to the count demurred to.^h Where a certificate was granted and the defendant paid the sum at once, and a rule *nisi* for a new trial was afterwards granted, the court refused to order the plaintiff to pay the sum so received into court, pending the rule.ⁱ

Affidavits were admitted in one case in support of an application for immediate execution,^j but rejected in another.^k

^a Fisher v. Davies, 1 M. Rob. 93. Percival v. Alcock, *Id.* 167. Ward v. Crockett, 5 C. & P. 10.

^b Barden v. Cox, 1 M. & Rob. 203. Young v. Crooks, *Id.* 220.

^c Bell v. Smith, 5 C. & P. 10.

^d *Anon.* 1 M. & Rob. 167.

^e Barden v. Cox, *supra*.

^f Hambidge v. Cawley, 5 C. & P. 9.

^g De Aranda v. Houston 6 C. & P. 511. (25 Eng. C. L. 516.)

^h Allsopp v. Smith, 7 C. & P. 708. (32 Eng. C. L.)

ⁱ Morton v. Burn, 5 Dowl. 421.

^j Ruddick v. Simmons, 1 M. & Rob. 184.

^k Gervas v. Burchley, *Id.* 150.

*CHAPTER XX.

REPLEVIN.

	PAGE
I. When replevin will lie.	
II. By and against whom it may be maintained.	1324
III. Mode of proceeding in replevin.	1325
IV. The declaration.	1328
V. The pleadings.	1329
VI. Avowries and cognisances.	1331
VII. Subsequent pleadings.	1335
VIII. Evidence.	1337
IX. Judgment.	1339
X. Costs.—Practice	1341
XI. Writs of recaption and second delivery.	1343
XII. Proceedings on the replevin bond.	1344
XIII. ——— against the sheriff for taking insufficient pledges.	1347

SECTION I.

WHEN REPLEVIN WILL LIE.

Replevin **REPLEVIN**, which is a personal action, lies to recover the possession of goods and chattels unlawfully taken. Though in practice it is principally confined to cases of distress for rent, *damage feasant*, poor rates, &c.; yet it is applicable to all cases where there has been a wrongful taking.^a It is the proper form of action to recover a specific chattel.^b Replevin, it is said, lies for whatever is capable of being distrained and for nothing else; for at common law it is the proper remedy to try the legality of a distress.^c If a landlord seizes goods as a distress for rent, and a tender of payment is afterwards made but refused, the tenant may maintain replevin in respect of the unlawful detainer; for after the tender made, the detention was a new taking.^d

Replevin But as replevin lies only where the goods are *unlawfully* does not lie where taken, it has been held that it cannot be maintained for goods unjustly detained by a party to whom they have been delivered

^a Com. Dig. Tit. Replevin, B. N. P. 53. *Shannon v. Shannon*, 1 Sch. & Lef. 324. See *Gilbert. Replev.* 85. *Wilkinson Rep.* 2.

^b *Rore v. Wilkinson*, 2 Stark. 287. (3 Eng. C. L. 349.)

^c *Att. Gen. v. Brown*, 1 Swanst. 296. *Woodf. L. & T.* 696. As to what chattels are distrainable, see *ante*, 794. Neither the removal of a distress for rent from the demised premises after five days, nor any appraisal of the distress, takes away the tenant's right to replevy. *Jacob v. King*, 5 Taunt. 451. (1 Eng. C. L. 154.) 1 Marsh. 135. If the goods remain unsold, the tenant may replevy after five days. *Anon.* 1 Chit. 196, *a.* And see *Griffiths v. Stephens*, 1 Chit. 196. (18 Eng. C. L. 65.)

^d *Evans v. Elliott*, 2 H. & W. 231. 6 N. & M. 606.

upon a contract, as goods delivered to a carrier.⁽¹⁾ And where an act of parliament orders a distress and sale of goods as for a penalty under a conviction, it is in the nature of an execution, and replevin will not lie unless given by the statute; for the legality of the conviction cannot be questioned in replevin.^b Therefore where a magistrate, having competent jurisdiction, adjudges as under the statute of laborers, 20 Geo. II, c. 19, s. 1, and on refusal to pay issues a warrant of distress and sale; the goods taken under it are not repleviable.^c So, goods taken in execution awarded by a higher court are not repleviable; and it seems that an attachment would lie for taking out a replevin in such case.^d It seems, however, to be doubtful whether goods taken under a warrant of distress granted by the commissioners of sewers;^e or under a warrant of distress for an assessment under the highway act, 13 Geo. III, c. 78, s. 47, may not be replevied.⁽²⁾

SECTION II.

BY AND AGAINST WHOM REPLEVIN MAY BE MAINTAINED.

To enable a party to maintain an action of replevin, he must have either a general or special property in the goods at the time of the taking.^f If several persons have separate and distinct interests in the property distrained, as if the goods of several persons be taken, they cannot join in this action, each must sue separately;^g but copartners, joint-tenants, and tenants in common should join.^h If the goods of a *feme sole* be taken and she marries, the husband alone may have replevin, for the property being personal is transferred by the marriage and vests absolutely in the husband;ⁱ or the husband and wife may join.^k (3) Executors may have replevin for the goods of the tes-

The plaintiff must have a property in the goods.
*1325

^a Golloway v. Bird, 4 Bing. 299. (13 Eng. C. L. 448.) 12 Moore, 547.

^b Bac. Ab. Tit. Replev. C. Com. Dig. Action (M. 6.)

^c Wilson v. Weller, 1 B. & B. 57. (5 Eng. C. L. 18.) 3 Moore, 294. And see Wootton v. Harvey, 6 East, 75. R. v. Monkhouse, 2 Stra. 1184.

^d Gilb. 161. See Anstr. 212.

^e Hurrell v. Wink, 8 Taunt. 369. (4 Eng. C. L. 136.) 2 Moore, 417. Pritchard v. Stephens, 6 T. R. 522.

^f Fenton v. Boyle, 1 Taunt. 344. 2 N. R. 399.

^g Co. Lit. 145, b.

^h Id. Gilb. Rep. 153.

ⁱ B. N. P. 53.

^j Gilb. 156. F. N. B. 69.

^k Cas. temp. Hard. 119.

(1) (Marshall v. Davis, 1 Wend. 109. Bruce v. Ogden, 6 Halsted, 370. Such, however, is not the law in Pennsylvania, in which state this action lies wherever one man claims personal chattels in the possession of another.)

(2) (Replevin will not lie for things taken from land by a person in possession under a claim of title. Snyder v. Vaux, 2 Rawle, 423. Powell v. Smith, 2 Watts, 126.)

(3) (Replevin cannot be maintained in the name of a husband and wife, to recover chattels.

tator taken in his life-time.* This action lies as well against the party who directs the taking of the goods as against the party who has actually taken them, or against both jointly.^{b(1)}

In this action both parties are considered as actors, the plaintiff, in respect of his action, and the defendant in respect of his having made the distress (being a claim of right, and the avowry in the nature of a declaration).*

SECTION III.

MODE OF PROCEEDING IN REPLEVIN.

REPLEVIN may be either by an original writ sued out of the Court of Chancery, at the common law; or by plaint, pursuant to the statute of Marlbridge, 52 Hen. III, c. 21, which enacts, "that if the beasts of any person are taken and unjustly detained, the sheriff, after complaint made to him, may deliver them without the hindrance or refusal of the person who shall have taken the beasts."

Replevin by *writ* is now quite obsolete; replevin by plaint is therefore the mode resorted to in modern practice. It has been held, that a distress made for poor's rate is within the statute of Marlbridge, and that the sheriff must replevy goods so distrained by plaint.^d The usual course is for the owner of
 *1926 *the goods taken to apply to the sheriff or to one of his deputies* to have the goods replevied. The stat. West. 2, c. 2, requires that the sheriff shall take of the party replevying pledges with sureties to prosecute his suit, or return the cattle if awarded. The sufficiency of the pledges being in the discretion of the sheriffs, and much inconvenience having arisen from their negligence in taking securities, it was enacted, by 11 Geo. II, c. 19, s. 23, for the prevention of vexatious replevins of distresses taken for rent, "that sheriffs and other officers having authority to grant replevins, shall in every replevin of distress for rent, before any deliverance of the distress, take in their own names from the plaintiff and two responsible persons, as sureties, a bond in double the value of the goods, conditioned

* Gilb. Rep. 156.

^b *Id.* 159.

* See 1 Saund. 347, b.

^c Sabourin v. Marshall, 3 B. & Ad. 440. (23 Eng. C. L. 113.)

^d The stat. 1 P. & M. c. 72, enacts, that the sheriff shall appoint at least four deputies in each county for the purpose of making replevins.

the property of the wife before marriage, unlawfully taken afterwards. The action must be in the name of the husband alone. *Seibert v. M^r Henry*, 6 Watts, 301.)

(1) (In replevin, the writ should issue against the person having, at the time, the actual possession of the goods claimed. *English v. Dalbous*, 1 Miles, 160.)

for prosecuting the suit with effect, and without delay, and for duly returning the distress in case a return shall be awarded."

The latter statute is confined to distresses for rent. When the distress is not for rent, the security *may* be a bond pursuant to the stat. of Westminster; and though it is not assignable, the sheriff may permit the defendant to sue upon it in his name. Where the replevin is in respect of a distress for rent, the security must be pursuant to the provisions of the statute, by bond, with two sureties in double the value of the goods distrained; which bond the sheriff is ordered to assign at the request of the avowant, who may sue upon it in his own name. The sheriff is not liable to an attachment for neglecting to take a replevin bond; the only remedy against him, is by an action on the case.^a

Upon the plaint being made, and the requisite securities given, the sheriff is obliged to replevy the goods, which he does either by granting his warrant, or directing his bailiff to deliver them. Proceed-
ings in the
county
court.

When the replevin is executed, the defendant should be summoned to appear the next court day, in the county court, in *which the sheriff is authorised by stat. 52 Hen. III, c. 21, to hold pleas on replevin whatever may be the value of the subject in dispute. Regularly the plaint should be entered in that court before the replevin is issued, for before the entry of the plaint there is no cause in court.^b The entry of the plaint is, however, the act of the sheriff, and the court of King's Bench will not on motion compel the sheriff to enter the plaint, though perhaps they might do so by *mandamus*.^c *1327

When the defendant claims the beasts or goods as his own property, the jurisdiction of the sheriff is at an end, he cannot replevy them; the course which the plaintiff should, under such circumstances pursue, is to sue out a writ *de proprietate probanda*, on which the sheriff may hold an inquest of office; and if the inquest find for the defendant, there is an end of the replevin by plaint; if for the plaintiff, the sheriff is to make deliverance.^d

When the plaint is entered, the subsequent proceedings in the county court are analogous to those in the courts above.^e It rarely, however, happens that any suit of importance is determined in an inferior court, as it may be removed without any cause shown by either of the parties, into the superior courts, at any time before final judgment.

^a *Evans v. Brander*, 2 H. Bl. 547. *Tesseman v. Gildart*, 1 N. R. 292. *Rex v. Lewis*, 2 T. R. 617; but see *Richards v. Acton*, 2 Bl. 1220.

^b *Tesseyman v. Gildart*, *supra*.

^c *Ex parte Boyle*, 2 D. & R. 14. (16 Eng. C. L. 46.)

^d See *Wilkinson on Rep.* 16. *Woodf. L. & T.* 708.

^e It does not fall within the design of this work to enter minutely into the proceedings in replevin in inferior courts. The reader who is desirous of further information on this subject may consult with advantage *Gilbert & Wilkinson's Treatises on Rep.*; and *Woodf. L. & T.* tit. "Replevin."

Removing the plaintiff. If the replevin be commenced in a county court, it may be removed by a writ of *re. fa. lo.*, (*recordari facias loquelam*,) when the suit is by plaint; or by a *pone loquelam*, when the suit is by writ, which is now obsolete; when the suit is commenced in any other inferior court, *not* of record, including courts in ancient demesne, it is removable by a writ of *accedas ad curiam*, which is a species of *recordari*; and when in an inferior court of record, it is removed by a *certiorari*. A plaint in replevin cannot be removed from a county court to a superior court, by *certiorari*, the proper mode being by a *re. fa. lo.*^a

*1328 A *re. fa. lo.* stays *all further proceedings in the county court, though delivered after interlocutory judgment, if before final judgment.^b When the replevin is removed to the court above, and an appearance entered, the plaintiff must declare in due time, or he will be liable to be non-prossed, as in any other action.^c

SECTION IV.

THE DECLARATION.

THERE are two modes of declaring in this action, namely, in the *detinet* or the *detinuit*. The former, where the goods are still detained by the party who took them, wherefore he detains the goods, &c., in which the plaintiff sought to recover back the goods detained, as well as damages for the detention and unlawful taking; the latter, where the goods have been redelivered to the plaintiff upon replevin, and he seeks damages for the taking. The former mode is, however, now obsolete, "no proceeding in replevin appears in any of the books which has not commenced either by writ requiring the sheriff to cause the goods of the plaintiff to be replevied to him, or by plaint in the sheriff's court, the immediate process upon which is a precept to replevy the goods of the party levying the plaint; both which proceedings are in *rem*, i. e. to have the goods again, and not for the recovery of damages only."^d

The uniformity of process act, 2 W. IV, c. 39, does not extend to actions of replevin removed to a superior court. The declaration must be entitled either of the term in which the writ is returnable, or of that in which the declaration is delivered; if entitled of an intermediate term, it will be irregular, and the defendant may sign judgment, though it seems that he cannot set aside the proceedings.^e The venue in this action is

Venue.

^a Edwards v. Bowen, 5 B. & C. 206. (11 Eng. C. L. 204.)

^b Bevan v. Prothesak, 2 Burr. 1151.

^c See 1 Tidd, 419. 2 Arch. Pr. 79.

^d Per Lord Ellenborough, C. J., Fletcher v. Wilkins, 6 East, 283.

^e Smith v. Muller, 3 T. R. 624. Topping v. Fuge, 5 Taunt. 774. (1 Eng. C. L. 261.) Stork v. Herbert, 1 Wils. 242.

local and material, but it may be laid in the county where the chattels were originally taken, or in any other county in which they were in the defendant's *custody, as the wrong continues *1329 wherever the defendant has them.^a

The place of taking, as well as the vill or parish, are material and traversable, and must be stated in the declaration, or it will be demurrable.^b If the close in which the cattle were taken has no name, it may be described by abutments as being in the occupation of a particular individual.^c The defect, however, may be cured by the defendant's pleading over, or by verdict.^d The precise day is not material. The plaintiff may declare for several takings, part at one day and place, and part at another day and place. If several cattle be taken some in one place, and some in another, the declaration should show how many were taken in each.^e The description and number of the cattle or goods taken should be stated with certainty, though the same strictness is not now required as formerly.^f There should, however, be more accuracy in the description in this species of action, than in trespass as the subsequent judgment of *retorno habendo* must depend on the number and description of the goods taken; a declaration for taking divers "goods and chattels" of the plaintiff without specification or enumeration, has been held bad for uncertainty; and though there was judgment by default, and a writ of inquiry had been executed, the defect was held not to be cured by the statute of geofails.^g

SECTION V.

THE PLEADINGS.

	PAGE		PAGE
1. Abatement.		2. <i>Non cepit</i> and <i>cepit in alio loco</i> .	1330

1.—*Abatement*.] THERE is a distinction between pleas in abatement in replevin and in other actions; for in other actions *a plea in abatement goes merely to the form of the writ, but in replevin the deliverance of the goods is usually immediate, so that the plaintiff has possession before the defendant can plead *1330

^a Walton v. Kersop, 2 Wils. 354.

^b Reade v. Hawke, Hob. 16. Ward v. Savile, Cro. Eliz. 896. 1 Saund. 347, n. 1.

^c Potters v. Bradley, 2 M. & P. 78. If replevin be brought in an inferior court the place of the caption must be alleged to be within the jurisdiction of the court. Quarles v. Serle, Cro. Jac. 95.

^d *Id.*

^e F. N. B. 68.

^f Com. Dig. Plead. 3 K.

^g See 2 Saund. 74, b.

^h Pope v. Tillman, 7 Taunt. 642. (3 Eng. C. L. 243.) 1 Moore, 382.

thereto; therefore a plea in abatement must give the defendant a title to the return of the beasts; for it is not enough to quash the writ, as in other cases where the defendant is in *statu quo* when the writ is quashed. Pleas in abatement, therefore, in this suit, partake of the nature of pleas in bar; indeed it is laid down by high authority, that they differ from pleas in bar only in this; that in abatement they do not avow or acknowledge the caption or detention, which is the gist of the action, but they must go to entitle the defendant to a delivery or else they do not take away the force and effect of the writ of replevin, which is always executed by the delivery.^a If there be a plea of abatement, and, in order to obtain a return of the beasts, an avowry or cognisance be stated, with the cause for distraining alleged, the avowry cannot be traversed.^b Pleas of property and *cepit in alio loco*, are instances of pleas in abatement. Where plaintiff in replevin took husband after the plaint, but before the removal thereof by *re. fa. lo.*; it was held, that the defendant might plead her coverture in abatement, though he removed the plaint by *re. fa. lo.*^c

Non cepit. 2.—*Non cepit and cepit in alio loco.*] The plea of *non cepit* is the general issue in this action, by which the defendant puts in issue, not only the taking, but also the taking in the place alleged in the declaration. (1) If it appear, however, that he had the goods in his *custody*, in the place alleged in the declaration the plaintiff will be entitled to a verdict on this plea.^d If the defendant had possession of the cattle, in the place mentioned in the declaration, only whilst he was taking them to the pound he should plead that fact specially, he cannot avail himself of it, under a plea of *non cepit*.^e In case of distresses made under some statutes, as for poor's rates by the 43 Elizabeth, *1331 *c. 2, s. 19, or for the sewer's rate by 23 Henry VIII, c. 5, s. 10, the defendant in replevin may plead not guilty,^f and give the special matter in evidence.

Cepit in alio loco. If under a plea of *non cepit*, the defendant proves the taking the goods in another place, the plaintiff will be nonsuited;^g but the defendant cannot have a return of the goods under this plea; to effect that object he should plead that he took the goods in another place, describing it, and traverse the place laid in the declaration, and avow or make cognisance, showing his right to take the goods, as in a plea in abatement.^h (2)

^a Gilbert's Rep. 169. Wilkinson's Rep. 46.

^b Foot's case, Salk. 93. Willes, 475. Bac. Ab. tit. Rep. Woodf. L. & T. 713.

^c Hollis v. Freer, 2 Bing. N. C. 719. (29 Eng. C. L. 467.) 2 Hodges, 5.

^d Walton v. Kersop, 2 Wils. 354.

^e Abercrombie v. Parkhurst, 2 B. & P. 480. 1 Saund. 387.

^f 1 Saund. 347, c.

^g Johnson v. Woolyer, 1 Stra. 507.

^h See 1 Saund. 247.

(1) (As to the plea of *non cepit*, *Mackinley v. McGregor*, 3 Wharton, 369. *Beatus v. Beckman*, 3 Wend. 667. *The People v. Niagara Common Pleas*, 4 Wend. 217.)

(2) (*Williams v. Welsh*, 5 Wend. 290.)

SECTION VI.

AVOWRIES AND COGNISANCES.

	PAGE		PAGE
1. Of the nature of an avowry and cognisance.		rent.	1332
2. Avowry and cognisance for		3. Avowry and cognisance for <i>damage feasant</i> .	1334

1.—*Of the nature of an avowry and cognisance.*] THE pleadings which principally occur in replevin are an avowry and cognisance. The distinction between which is this; where the action is against the principal or landlord he makes *avowry*—that is, he avows taking the distress in his own right; where, on the other hand, it is against the bailiff or servant he makes *cognisance*—that is, he acknowledges the taking in the right of the principal or landlord; and where it is against both, the one avows, and the other makes cognisance.^a An avowry or cognisance is in the nature of a declaration; it sets forth the merits of the defendant's case, and shows that the distress was lawful. As the object of the avowry is to obtain a return of the goods, the defendant should state sufficient matter to entitle him to such return. Greater strictness is required in some cases in stating title in an avowry than in a declaration.^b In all cases, except where the defendant claims property in the goods, he must avow in order to entitle himself to a return. A party in justifying ^{*a} a distress may allege a different cause from that which he assigned on making it; if he can show a legal justification for what he did, it is sufficient. Thus, he may distrain for rent, and avow for heriot service.^c

Distinction between avowry and cognisance.

*1332

2.—*Avowry and cognisance for rent.*] At common law it was necessary to show in an avowry or cognisance for rent the quantity and commencement of the estate of the defendant, and other particulars respecting title, which was productive of much inconvenience, to remedy which it was enacted by stat. 11 Geo. II, c. 19, s. 22, "that defendants in replevin might avow or make cognisance generally, that the plaintiff in replevin, or other tenant of the lands, whereon the distress was made, enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for accrued, which rent was then and still remains due; or that the place, where the distress was taken, was parcel of such certain tenements holden of such honor, lordship, or manor, for which tenements, the rent, relief, heriot or other service distrained for was at the time of such distress, and still remains due." Rents,

It is sufficient to avow the defendant's title generally.

^a Wilk. Rep. 51.

^b *Id.* 53.

^c Crowther v. Ramsbottom, 7 T. R. 657. Gwinnett v. Phillips, 3 T. R. 646.

reliefs, heriots, or other services are expressly mentioned, in the statute, and it has been construed to extend to furnished lodgings.^a But a rent-charge is not within this enactment;^b (1) nor is a heriot custom; the avowry therein, therefore, must allege seisin of the lord, &c.^c

An avowry being in the nature of a declaration, it is sufficient if it be certain to a common intent; it should, however, show with certainty, the place, day, and number of cattle taken. Although a landlord may avow generally for rent in arrear, yet the terms of the contract under which the tenant holds must be truly stated in the avowry.^d So the terms of the tenancy as to the amount of the reserved rent, and times of payment, must be correctly described.

*1333 *Where the defendant avowed on a contract for 110*l.* rent and proved a demise at 15*s.* an acre, amounting to 111*l.*, it was held to be a fatal variance.^e

An avowry for more or fewer premises than the defendant held in fact, will not be fatal.

An avowry for rent need not allege in precise terms that the plaintiff was tenant to the avowant; it is sufficient if the fact of the tenancy can be collected from the whole of the avowry.^f But it will not be a fatal variance if the avowry state that the defendant held more premises than he did hold in fact. Where the defendant avowed for rent in arrear for a dwelling-house with appurtenances, and it appeared in evidence that the plaintiff merely occupied the upper part of the house, and that the shop and yard were in the occupation of other tenants; held, to be no variance.^g Nor is it a fatal variance if the avowry allege a holding of fewer premises. Where in replevin for illegally distraining plaintiff's growing corn in four closes, the defendants avowed the distress for rent in arrear, averring that plaintiff held the closes in which, &c., at and under a certain yearly rent; to which the plaintiff pleaded that he did not hold in manner and form as alleged; upon proof that the plaintiff held the four closes and two others at the rent stated in the avowry; held, no variance.^h It is not necessary to aver that the rent still remains due;ⁱ nor will it be a fatal variance if

^a *Newman v. Anderton*, 2 N. R. 224. *Short v. Hubbard*, 2 Bing. 349. (9 Eng. C. L. 429.) 9 Moor, 667.

^b *Bulpit v. Clarke*, 1 N. R. 56. It is, however, within sec. 23, as to taking a bond, *id.*

^c 2 Saund. 168, *a.* Co. Ent. 613.

^d *Philpott v. Dobbinson*, 6 Bing. 104. (19 Eng. C. L. 18.) 3 M. & P. 320.

^e *Brown v. Sayce*, 4 Taunt. 320. And see *Smith v. Walton*, 8 Bing. 235. (21 Eng. C. L. 286.) 1 M. & Scott, 380.

^f *Innes v. Colquhoun*, 7 Bing. 265. (20 Eng. C. L. 125.) 5 M. & P. 63.

^g *Page v. Chuck*, 10 Moore, 264. (17 Eng. C. L. 142.)

^h *Hargrave v. Shewin*, 9 D. & R. 20. 6 B. & C. 34. (13 Eng. C. L. 102.)

ⁱ *Clarke v. Davies*, 7 Taunt. 72. (2 Eng. C. L. 30.)

(1) (In an avowry upon a distress for a *ground rent* it is not necessary to set out the title of the ground landlord. *Franciscus v. Reigart*, 4 Watts, 38. The reason is, that a ground rent in Pennsylvania which is a rent reserved upon a conveyance in fee with a clause of distress is not a rent charge. The *st. Quia Emptores* is not in force in that state.)

more rent be avowed for than is proved to be due; for if the defendant avow for more than is due he will be entitled to recover as much as he can prove to be due, as if he avow for two years and a quarter rent, and show that two years' rent are due, he will recover the latter sum.^a

Where one is not sole seised, or has not sole title to the entire rent, he cannot avow alone; therefore parceners must join in avowry or cognisance for rent, for they make but one heir, and the rent is an entire inheritance.^b An avowry by "one of several co-heirs in gavelkind, in his own right, with a cognisance as bailiff of the other co-heirs, is sufficient without averring an authority to distrain from the other co-heirs." An avowry by a husband alone in his own name for rent due in the right of his wife, is good, if it appear on the record that he was entitled to make the distress.^d Tenants in common cannot join in avowry for rent, though they must join in an avowry for *damage feasant*.^e

Where two or more persons have a title.
*1934

An executor or administrator may avow for rent due to the deceased, in his lifetime;^f and he need not show the testator's title, or how he (the defendant) was entitled to distrain; at all events, the omission cannot be objected to after verdict;^g nor need he show how the plaintiff became entitled to hold the premises.^h In replevin, an avowry or cognisance for rent admits the property of the goods in the plaintiff; but if the plaintiff's plea subsequently shows the property of the goods to be in another, the plaintiff cannot maintain the action.ⁱ Where the avowry is for parcel of a rent, or penalty only, it ought to show that the residue has been satisfied or discharged, otherwise it will be bad on demurrer.^j

Executors

3.—*Avowries and cognisances for damage feasant.*] Avowries and cognisances, *damage feasant*, are not within the 11 Geo. II, c. 19; the title of the avowant, therefore, must be set forth with particularity. It is not sufficient to state that the defendant was lawfully seised or possessed, &c., but the seisin in fee, or the demise, must be set forth according to the fact.^k Where in replevin of cattle taken in *A.*, the defendant

^a Forty v. Imber, 6 East, 434. Harrison v. Barnby, 5 T. R. 548. Johnstone v. Huddleston, 4 B. & C. 938. (10 Eng. C. L. 471.) See Neale v. Mackenzie, 1 Gale, 119.

^b Stedman v. Page, 1 Salk. 390. 5 Mod. 141.

^c Leigh v. Shepherd, 5 Moore, 297. 2 B. & B. 465. (6 Eng. C. L. 203.)

^d Wise v. Bellent, Cro. Jac. 283. Gravenor v. Woodhouse, 9 Moore, 148. (9 Eng. C. L. 321.)

^e Harrison v. Barnby, 5 T. R. 246. Cully v. Spearman, 2 H. Bl. 386.

^f 32 Hen. VIII, c. 27. 3 & 4 W. IV, c. 42, s. 37.

^g Martin v. Burton, 1 B. & B. 279. (5 Eng. C. L. 82.) 3 Moore, 608.

^h Meriton v. Gilbee, 8 Taunt. 159. (4 Eng. C. L. 57.) 2 Moore, 48.

ⁱ Clarke v. Davies, 7 Taunt. 72. (2 Eng. C. L. 30.)

^j Hunt v. Braines, 4 Mod. 402. Holt v. Sambach, Cro. Car. 104. Johnson v. Baines, 12 Mod. 84.

^k Bac. Ab. Rep. F. Hawkins v. Eccles, 2 B. & P. 359.

- avowed the taking in *A.* under a demise of certain premises of which *B.* was parcel, and because the cattle were *damage feasant* in *B.*, *he took them and drove them through *A.* in his way to the pound; upon general demurrer, the avowry was held to be well pleaded.^a

SECTION VII.

SUBSEQUENT PLEADINGS.

THE defendant having pleaded, or avowed, or made cognisance, the plaintiff either suffers judgment by default, or replies to the plea in abatement or in bar, or confesses judgment on the avowry or cognisance, or pleads thereto; an avowry or cognisance being, as we have seen, in the nature of a declaration, the plaintiff's reply thereto is termed a plea and not a replication, as in other actions. A plea in abatement of an avowry is unheard of in modern practice.^b Pleas in bar traverse some allegations in the avowry or cognisance, or allege new matter.

- De injuriâ* Formerly it was considered that *de injuriâ* could not be pleaded to an avowry;^c but in a modern case it has been held, that to an avowry under a distress for a poor's rate a general plea in bar *de injuriâ* was sufficient.^d To an avowry or cognisance for rent, the plaintiff cannot plead *nil habuit in tenementis*;^e but he may plead *non demisit* or *non tenuit*,^f or a tender of the rent.^g

Nil habuit in tenementis. Non demisit.

Where an avowry stated that the defendant held the premises at a certain yearly rent, to wit, the yearly rent of 72*l.*, and the plaintiff pleaded, first, *non tenuit*; and secondly, *riens in arriêre*; and the first plea was found for the plaintiff; held, that the second plea became thereby immaterial, and that the proper course was to discharge the jury from finding any verdict upon *it, but that if any verdict was entered upon it, it must be entered for the plaintiff.^h

- *1336 *Levancy and couchancy.* In replevin for taking a stranger's cattle for rent in arrear, a plea, that the cattle "were not levant and couchant in the

^a *Abercrombie v. Parkhurst*, 2 B. & P. 480.

^b Wilk. 74.

^c 2 Saund. 284, n. 1 Heath. Max. 127. *Jones v. Kitchin*, 1 B. & P. 76.

^d *Bardons v. Selby*, 9 Bing. 756. (23 Eng. C. L. 456.) 3 M. & Scott, 280. S. C. in error, 3 B. & Ad. 2. (23 Eng. C. L. 9.) 2 C. & M. 500.

^e Gilbert. Rep. 199. *Sullivan v. Straddling*, 2 Wils. 208. *Alchorne v. Gomme*,² Bing. 54. (9 Eng. C. L. 313.) 9 Moore, 130.

^f 1 Ch. Pl. 591. 3 *id.* 1114. *Wilson v. Ames*, 1 Marsh. 74.

^g B. N. P. 60. *John v. Jenkins*, 1 C. & M. 227.

^h *Cossey v. Diggon*, 2 B. & A. 546.

close in which," &c., is bad on demurrer, for not showing the circumstances under which the cattle came upon the close, so as to entitle them to be privileged from distress; for the mere want of levancy and couchancy was not sufficient to protect them from distress; if they were on the premises with the consent of the owner, levancy and couchancy were immaterial.^a

Payment may be pleaded in bar to an avowry.^b Therefore Payment. to an avowry for rent, the tenant may plead payment of a ground rent to the original landlord.^c So he may plead payment of an annuity, secured out of the lands demised previously to the demise to him, for the arrears of which the grantee of the annuity had threatened to distrain.^d Where to an avowry in replevin for rent in arrear, the plaintiff pleaded in bar, payments for land-tax and paving rates for six successive years, in order to avoid a distress; and that the sums so paid by him exceeded the amount of the rent distrained for; held, that such a plea was bad on demurrer, as the tax and rates should have been deducted by the plaintiff from the rent of the current year, and as the plea in substance amounted and was equivalent to a set-off.^e The plaintiff cannot claim on his plea, a deduction for land-tax, unless the sum distrained for was due at the time of such payment.^f The statutes of set-off Set off. do not extend to the action of replevin.^g But a plea in bar that the plaintiff had let other property to the defendant at a larger rent, and that it had been agreed that the two rents should be set-off against each other, has been held good.^h(1)

*Replevin for taking the plaintiff's goods and chattels; to wit, a lime kiln; avowry for rent; plea in bar that the lime-kiln was affixed to the freehold; the court held the plea in bar to be bad, because it was a departure from the declaration.ⁱ *1337 Departure

To an avowry or cognisance for *damage feasant* by a freeholder, a copyholder, or his tenant, the plaintiff may deny his title, or allege title in himself, or in some other person by whose license he put his cattle there;^j or he may allege a right *for damage feasant*.

^a Jones v. Powell, 8 D. & R. 416. 5 B. & C. 647. (12 Eng. C. L. 342.)

^b B. N. P. 181.

^c Sapsford v. Fletcher, 4 T. R. 511.

^d Taylor v. Zamira, Marsh. 220. 6 Taunt. 524. (1 Eng. C. L. 472.)

^e Andrew v. Hancock, 3 Moore, 278. S. C. 1 B. & B. 37. (5 Eng. C. L. 10.)

^f Stubbs v. Parsons, 2 B. & A. 516.

^g Laycock v. Tuffnell, and Graham v. Fraine, 1 Tidd's Prac. 716. Laycock v. Tuffnell, 2 Ch. 531. (18 Eng. C. L. 409.)

^h Curtis v. Wheeler, 4 C. & P. 196. (19 Eng. C. L. 340.)

ⁱ Niblet v. Smith, 4 T. R. 504.

^j 2 Saund. 206, a. n. 22. 1 Saund. 103, b. 1 Ch. Pl. 591. Com. Dig. tit. Pleader, 3 K. 20.

(1) (In replevin no set-off is allowable. But the tenant may show a failure of the consideration for the rent, by the landlord's omission to fulfil his part of the contract, which operates as an exemption of the tenant from an equivalent portion of the rent. In such case the measure of damages to the tenant is, the difference between the annual value of the premises with and without that covenant performed; speculative or remote damages, such as a loss of custom to the tenant, cannot be allowed. *Fairman v. Fluck*, 5 Watts, 516. *Beyer v. Fenstermacher*, 2 Wharton, 95.)

of common in the *locus in quo*,^a or he may plead a tender of amends."^b

In replevin, the plaintiff may plead several matters to an avowry or recognisance, but not to pleas in bar or justifications.^c But by Reg. Gen. H. T. 4 W. IV, "pleas, avowries, and cognisances, founded upon one and the same principal matter, but varied in statement, description or circumstance, (and pleas in bar and in replevin, are within the rule,) are not to be allowed."

SECTION VIII.

EVIDENCE.

THE nature of the evidence in replevin depends upon the issue. Under a plea of *non tenuit* or *non demisit*, the defendant must prove a demise as alleged in the avowry. Evidence of the plaintiff's holding under such circumstances as would warrant the defendant to make a distress, will be sufficient to sustain this issue.^d The plaintiff cannot, in this action, give evidence to disprove his landlord's title, even though it be founded in fraud.^e Proof of payment of rent to the avowant, is *prima facie* evidence that he is the owner of the land; yet in a case where the plaintiffs did not originally receive the possession of the land from the avowant, it is competent to rebut the title of *the avowant, by showing that he paid rent under circumstances which did not entitle the avowant to the rent.^f The plaintiff, who had occupied lands under A., upon A.'s death entered into an agreement to pay rent to the defendant, and pay 1s. as an acknowledgment of his title, being ignorant that it was disputed; it turning out afterwards that the defendant had no claim to the property; held, that the plaintiff might dispute the defendant's title in a plea of *non tenuit* in replevin.^g But where the plaintiff came into occupation under one who had submitted to a distress by the defendant; it was held, that he was thereby estopped from disputing the defendant's title to the rent, though the latter had put in evidence a document which showed that the plaintiff's predecessor occupied under a lease to which the defendant was in law a stranger; for it was not incompatible with that document that there might

^a *Id.*

^b Com. Dig. tit. Pleader, 3 K.

^c 4 Anne, c. 16, s. 4. Wilk. 78.

^d See *ante*, 786, as to the holding which will subject a tenant to distress.

^e Parry v. House, Holt, 489. (3 Eng. C. L. 167.)

^f Rogers v. Pitcher, 6 Taunt. 202. (1 Eng. C. L. 355.) See Fenner v. Duplock, 2 Bing. 10. (9 Eng. C. L. 294.)

^g Gregory v. Doidge, 3 Bing. 474. (13 Eng. C. L. 50.)

be a subsequent deed between the occupiers and the defendant; and as payment of rent, or submitting to a distress, was an acknowledgment of tenancy, the plaintiff should at least show that such acknowledgment was by mistake, or that some other person was entitled to receive the rent.^a

If issue be joined on the plea of *riens in arrièrè*, which admits the title of the defendant, it is incumbent on the plaintiff to prove that no rent is due. Under this plea, the plaintiff cannot show payment to one who claimed by a superior title, under a threat of distress; such payment should be pleaded specially.^b

The party under whom the defendant makes cognisance is not an admissible witness for him;^c but he is a good witness for the plaintiff, though his declarations are not admissible in evidence for him, because he may be examined himself.^d (1) In replevin, by an under-tenant against a landlord, who, in order to satisfy rent due from his tenant, distrained on the under-tenant, and avowed as bailiff of his tenant; held, that the *latter was not a competent witness to prove the amount of the rent due from the under-tenant to him.^e

Where distinct cognisances are made for the same goods under several parties, not appearing to be connected in interest, if one of the cognisances be abandoned at the trial, the party under whom it was made is a competent witness for the defence.^f

SECTION IX.

JUDGMENT.

If in replevin the verdict be found for the plaintiff, the jury assess the damages for the injury which he has sustained by the taking of the goods only; for we have seen, that the goods

^a *Cooper v. Blandy*, 1 Bing. N. C. 45. (27 Eng. C. L. 304.) 4 M. & Scott, 562.

^b *Taylor v. Zamira*, 6 Taunt. 524. (1 Eng. C. L. 472.) As to payments of which the plaintiff may avail himself, see *ante*.

^c *Golding v. Nias*, 5 Esp. 274.

^d *Hart v. Horn*, 2 Camp. 92. *Johnson v. Mason*, Esp. 89.

^e *Upton v. Curtis*, 8 Moore, 52. 1 Bing. 210. (8 Eng. C. L. 299.) In reference to this case, Lord Denman has said, "there is reason to suppose that the facts are not reported with perfect accuracy, and the court only held that an intermediate tenant, under whom cognisance had been made, (the distress being taken by the landlord,) was not admissible to prove the amount of the sub-tenant's rent. And this may have been because he had an interest in reducing his own rent by raising that of his tenant;" in *King v. Baker*, 2 Ad. & Ell. 340. (29 Eng. C. L. 119.)

^f *King v. Baker*, 2 Adol. & Ellis, 333. (29 Eng. C. L. 110.) 4 N. & M. 298.

(1) (In replevin by a stranger whose goods have been distrained, the tenant is not a competent witness to prove that no rent was due. *Kessler v. McConachy*, 1 Rawle, 435.)

distrainted are delivered to him by the sheriff on replevying and the judgment is, that the plaintiff do recover from the defendant the damages assessed by the jury and costs.⁽¹⁾ If the plaintiff has judgment upon demurrer, *nil dicit, cognovit actionem*, &c., a writ of inquiry of damages shall be awarded; or by the consent of both parties, the court may assess the damages without such writ.^a

If a verdict be found for the defendant, the judgment at common law is, that he have a return of the goods irrepleviable.⁽²⁾ As at common law the defendant was not allowed damages or costs in replevin;^b it was enacted by 7 H. VIII, c. 4, s. 3, "that avowants and persons making cognisance for rents, customs, and services, if they obtain a verdict, or the plaintiff be nonsuited, or otherwise barred, shall recover damages and costs, as the plaintiff would have done if he had recovered." ^{*1340} "The 21 Hen. VIII, c. 19, s. 3, extended this provision to avowries and cognisances, to distress damage feasant, or other rents, upon any distress taken in the lands and tenements."

The judgment, after verdict for the defendant, need not express the goods to be irrepleviable; it is sufficient either at common law, or under the preceding statute, if it be expressed in these terms, "that the defendant have a return of the cattle, and recover his damages and costs assessed by the jury," &c., because since the stat. Westminster 2, (13 Ed. I, c. 2, s. 3,) the return is, in point of law, in all cases irrepleviable.^c

The proceedings in cases of distress for rent, are regulated by 17 Car. II, c. 7; sec. 2, of which enacts, "that whenever any plaintiff shall be nonsuit before issue joined in any suit of replevin, by plaint or writ, lawfully removed or depending in any of the superior courts, the defendant may make a suggestion in nature of an avowry or cognisance for the rent arrear, whereupon the court, upon prayer of the defendant, will award a writ of inquiry touching the sum in arrear at the time of the distress, and the value of the distress; of which inquiry the plaintiff shall have fifteen days' notice."^d On the return of the inquisition, the defendant will have judgment to recover the rent arrear, if the distress amounts to the value of it; if not, then to recover the value of the distress, with full costs. And if

^a 1 Arch. K. B. Prac. 236. 2 Sell. Prac. 272.

^b Wilk. 86.

^c Gammon v. Jones, 4 T. R. 509.

^d Burton v. Hickey, 6 Taunt. 57. (1 Eng. C. L. 306.)

(1) (As to goods delivered to the plaintiff in replevin and remaining with him he can only recover damages for the caption and detention. But as to goods cloigned, he may in addition thereto, recover their value in damages. *Mackinley v. McGregor*, 3 Wharton, 369.)

(2) (When the goods have been delivered to the plaintiff and the question is on the property in them, if the jury find a verdict for the defendant in a certain sum, it will be intended that the sum found is for damages for the detention; and on it a judgment *de retorno habendo* is good. *Huston v. Wilson*, 3 Watts, 287.

In replevin on the plea of property, it seems that a general judgment for the plaintiff with damages, without specifying the value of the goods *eo nomine* is good. *Marsh v. Pier*, 4 Rawle, 273. *Etter v. Edwards*, 4 Watts, 63.)

he plaintiff shall be nonsuit, after cognisance or avowry made, and issue joined; or if a verdict shall be given against the plaintiff, then the jurors that are impanelled to inquire of such issue, shall, at the prayer of the defendant, inquire concerning the sum of the arrears and the value of the distress, and thereupon the defendant is entitled to the same judgment as above."

Sec. 3, gives the like remedy to the avowant, or party making cognisance for any rent, upon a judgment given for him on demurrer; and section 4 enacts, "that in all the preceding cases, where the value of the cattle distrained shall not be found to the full value of the arrears, the party to whom such arrears are due, his executors or administrators may, from time to time, distrain again for the residue."

This statute has not superseded the judgment at common law; it only gives a further remedy to the avowant; who may elect to proceed upon it, or take the remedy at common law.^a It was formerly considered that the defendant must either have judgment and execution for the sum settled by the jury, pursuant to the above statute, or he must take the usual remedy by writ *de retorno habendo*, and proceed under 11 Geo. II.^b But in a modern case, it was decided that if the defendant does not issue execution on his judgment under the statute, or if the sum recovered be not paid before action brought, he may still proceed on the replevin bond as a farther and better security.^c Where the verdict is for the defendant, if the jury have omitted to inquire at the trial as the statute directs, judgment must be entered *de retorno* as at common law; but if the jury have assessed the damages, but not the amount of the rent, it may be entered as a judgment under 21 Hen. VIII, c. 19.^d The omission of the jury, who tried the cause, to make the necessary inquiries, cannot be supplied by a writ of inquiry; for the statute provides that the *jurors who were impanelled to inquire of the issue*, should inquire concerning the sum in arrear, and the value of the distress.^e But in every case in replevin, except where the court is tied up by 17 Car. II, c. 7, which respects only rent in arrear, a writ of inquiry may be granted in order to complete justice.^f

*1341

If the defendant does not issue execution on the judgment, he may proceed on the replevin bond.

^a Rees v. Morgan, 3 T. R. 350.

^b Combes v. Cole, Cas. temp. Hardw. 352. Com. Dig. Pl. 3 K. 31. 2 Tidd's Prac. 1056.

^c Turner v. Turner, 4 Moore, 606. 2 B. & B. 107. (6 Eng. C. L. 36.)

^d 2 Sell. Prac. 271. Baker v. Lade, Carth. 254.

^e Herlert v. Waters, 1 Salk. 205. Sheape v. Culpepper, 1 Lev. 255. Rees v. Morgan, *supra*.

^f Per Lord Harkwicke, C. J., in Vaughan v. Norris, Cas. temp. Hardw. 138.

SECTION X.

COSTS.—PRACTICE.

Costs. By the statute of Gloucester, the plaintiff in replevin is entitled to costs: and the 7 & 8 Hen. VIII, c. 11, and 21 Hen. VIII, c. 19, give costs to every avowant and to any person making cognisance *or justifying as bailiff in replevin, for any rent, custom, or service, or for *damage feasant*, if his avowry, cognisance, or justification be found for him, or the plaintiff be otherwise barred.

*1342

By 11 Geo. II, c. 19, s. 22, a defendant in replevin, making avowry or cognisance upon distresses for rent, relief, heriot, or other service, is entitled to double costs, in case the plaintiff shall become nonsuit, discontinue, or have judgment against him. If a verdict be found for a defendant in replevin, upon an avowry generally, as landlord, he is entitled to his double costs under 11 Geo. II, c. 19, s. 22, though the replevin be brought solely for the purpose of trying the title to the premises.^a

Practice.

A plaintiff in replevin is not entitled to security for costs, although the defendant is in insolvent circumstances; for, in point of fact, he defends the action.^b The court will not stay proceedings in replevin, unless upon payment of the rent in arrear, together with the costs, though the arrears were tendered before replevin, with costs up to that time.^c Nor upon payment of costs upon the application of the defendant; for both parties are actors in replevin, and the plaintiff is entitled to his judgment.^d The plaintiff may pay the rent into court, for which the defendant avows.^e Although a party cannot proceed for damages upon a plea of tender, after taking the money out of court, yet in a plea of tender to an avowry for rent, the plaintiff need not bring the money into court; as in replevin both parties are actors, and either party is at liberty to carry the cause down for trial.^f A defendant is not entitled to move for judgment, as in case of nonsuit, under stat. 14 Geo. II, c. 17, s. 1.^g If, however, the defendant gives notice *and does not go on to trial, the court will give costs against him.^h

*1343

^a Staniland v. Ludlam, 7 D. & R. 484. (10 Eng. C. L. 465.)

^b Heskett v. Biddle, 1 Hodges, 119. 3 Dowl. 634.

^c Hopkins v. Shrole, 1 B. & P. 382.

^d Hodgkinson v. Snibson, 3 B. & P. 603. Where avowry is for *damage feasant*, the proceedings cannot be stayed because the court, in such case, have no rule to guide them in ascertaining the damages.

^e Vernon v. Wynne, 1 H. Black. 24. ^f B. N. P. 60.

^g Shortridge v. Hiern, 5 T. R. 400, S. P. Jones v. Concannon, 3 T. R. 661. Eggleton v. Smart, 1 W. Black. 375. And see Rees v. Morgan, 3 T. R. 349.

^h B. N. P. 61.

SECTION XI.

WRITS OF RECAPTION AND SECOND DELIVERANCE.

IF after the goods are restored to the plaintiff by the sheriff, ^{Writ of re-} on replevying, and before the suit is terminated the defendant ^{caption.} make a second distress of the same or of any other goods, for the same rent or duty, the plaintiff may sue out a *writ of recaption*, in which the defendant cannot avow as in replevin; but he may justify, as in trespass, the taking for another cause. If the defendant be convicted under this writ, he is liable to pay a fine to the crown, because by the second caption he takes upon himself to determine the justice and legality of the first, while that very point is under the consideration of the court in which the replevin depends.^a If however the same cattle, or other cattle of the same proprietor, come on the land *damage feasant*, they may be distrained again, because such distress is for a distinct injury.^b

At common law, if the plaintiff was nonsuited, the defendant was entitled to have the goods returned; but the plaintiff ^{Writ of} might replevy them as often as he thought proper; to remedy ^{second de-} this evil the statute Westminster 2, restrained the plaintiff ^{liverance.} from replevying after nonsuit; but gave him a writ of *second deliverance*, which is in the nature of a new replevin. If, in this writ, the plaintiff does not prevail in his suit, the defendant shall have a return of the goods irrepleviable. The writ of second deliverance is a *supersedeas*, in law, to the writ of *retorno habendo*, but not to the writ of inquiry of damages, under 7 Hen. VIII, c. 4, and 21 Hen. VIII, c. 19, or under 17 Car. II, c. 7. When the distress is for rent, it seems that the latter statute has taken away the *writ of second deliverance*.^c

*SECTION XII.

*1344

PROCEEDINGS ON THE REPLEVIN BOND.

WE have seen that when goods are replevied, the sheriff is required by statute Westminster 2, to take *pledges* for the prosecution of the suit, and for a return of the goods if awarded; and that by 11 Geo. II, c. 19, s. 23, he is required, in cases of distress for rent, to take a *bond*, with sureties, &c., conditioned for prosecuting the suit with effect, &c.^d Before the passing of

^a Gilbert. Rep. 227. Wilk. 131.^b *Id.* F. N. B. 71.^c 1 Saund. 195. Wilk. 138. Gilbert. Rep. 217. Bac. Ab. tit. Rep. (E. 3.)^d See *ante*, 1326.

What will amount to a forfeiture of the replevin bond.

the latter statute it was the practice to take bonds under the former, though the sheriff was only required to take pledges.^a The condition of replevin bonds being to prosecute the suit with effect and without delay, and to return the distress in case a return be awarded, the bond is forfeited and the sureties become liable thereon, in case the plaintiff fails in any of these requisites. The bond therefore is forfeited if the plaintiff do not appear in the county court next after giving the bond, and enter his plaint there, and afterwards proceed in the prosecution.^b So if he does not use due diligence in prosecuting the suit, he is guilty of a breach of that part of the condition which requires him to prosecute without delay, even though it may not appear that the suit is determined; but he is not responsible for any delay which may have proceeded from the negligence of the sheriff.^c "When the breach assigned is, that the plaintiff did not prosecute his suit *with effect*, it is a sufficient answer to show that the suit is still pending; but it is no answer when the breach is, that he did not prosecute it without delay."^d The condition of the bond for prosecuting the suit "with effect," means prosecuting it "with success," and therefore, if a plaintiff in replevin fails, the bond is broke, and the defendant is not restrained from suing on the bond, though he omits to sue out a writ *de retorno habendo*, and cause *elongata* to be returned "thereon." The condition is not satisfied by a prosecution of the suit in the county court; but if the plaint be removed by *re. fa. lo.* into a superior court, it must be prosecuted there with effect, and a return made, if adjudged there.^e Therefore where the plaintiff was nonsuited for want of a plea in bar, it was held that the avowant might sue the sureties on the bond, and that he need not execute a writ of inquiry for his damages, because the plaintiff had not prosecuted his suit with effect.^f

*1344

But if the plaintiff be restrained by injunction out of the Court of Chancery, or if he die before the suit is determined, whereby the suit abates, the bond will not be forfeited.^h

Who may sue on the bond.

Assigning the bond.

When a replevin bond is forfeited, the sheriff or his assignee may sue upon it; for the 11 Geo. II, c. 19, directs the sheriff or person taking such bond, to assign the same at the request and costs of the avowant or person making cognisance. It has been held under this statute, that the sheriff or his deputy may assign the bond to the avowant or conuzor, or to both *jointly*;ⁱ

^a Wilk. 112.

^b Dias v. Freeman, 5 T. R. 195. Com. Dig. tit. Repl. D.

^c Harrison v. Wardle, 5 B. & Ad. 146. (27 Eng. C. L. 64.) See Turner v. Turner, 4 Moore, 606. 2 B. & B. 107. (6 Eng. C. L. 36.) Axford v. Perrett, 4 Bing. 586. (15 Eng. C. L. 82.) 1 M. & P. 470.

^d Per Parke, J., in 5 B. & Ad. 153. (27 Eng. C. L. 69.)

^e Perreau v. Devan, 8 D. & R. 72. 5 B. & C. 284. (11 Eng. C. L. 230.)

^f Gwillim v. Holbrook, 1 B. & P. 410. ^g Waterman v. Yea, 2 Wils. 41.

^h Ormond (Duke of) v. Bierley, Carth. 519. 12 Mod. 380.

ⁱ Phillips v. Price, 3 M. & S. 180.

or to the conuzor only, if there be no avowant;^a or to the avowant only, though there be a conuzor; but it seems to be questionable whether there can be an assignment to the conuzor when there is an avowant.^b

It has been held that where the plaintiff and defendant in replevin referred the cause to an arbitrator, and agreed without the privity of the replevin bond sureties, that the bond should stand as a security for the performance of the award, the sureties were discharged.^c

What amounts to a discharge of the sureties.

But where the plaintiff and the principal entered into an agreement, which was made a rule of court, to stay all proceedings in replevin, upon payment, by the latter, of a certain sum of money; it was held, that the surety was not thereby discharged after breach by the principal, but that he was liable for so much as appeared upon a reference to be due.^d So it has been held to be no plea to an action against the sureties, that the replevin suit was referred to an arbitrator, and that he without the knowledge of the sureties, enlarged the time for making the award.^e So where the parties to a replevin suit referred to arbitration the time of payment of the rent, with certain claims of the tenant on the landlord, for damages, with liberty for the tenant to deduct them, when awarded, from the rent, and agreed to suspend proceedings in replevin pending the reference; held, after award made, that the sureties in the replevin bond were not thereby discharged.^f

*1346

The bond may be put in suit, though it may not in all points be conformable to the directions of the statute (11 Geo. II, c. 19;) as if it be executed by one of the sureties only,^g or though it contain no condition that the suit should be prosecuted without delay.^h

The plaintiff in an action on this bond may declare in the *debet* and *detinet*, or in the *detinet* only.ⁱ The court will not set aside proceedings on the bond, because the action is commenced before breach, for that fact may be pleaded;^j nor will they set aside an execution in an action on a replevin bond, upon an objection to the proceedings which might have been taken before judgment.^k The action on the bond must be brought in the same court in which the *re. fa. lo.* is returnable; but it may be brought in a superior court, though the plaint be not removed out of the county court.^l

Action on the replevin bond.

^a Page v. Eamer, 1 B. & P. 378.

^b Archer v. Dudley, 1 B. & P. 381.

^c Archer v. Hale, 4 Bing. 464. (15 Eng. C. L.) 1 M. & P. 285.

^d Hallett v. Mountstephen, 2 D. & R. 343. (16 Eng. C. L. 92.)

^e Aldridge v. Harper, 10 Bing. 118. (25 Eng. C. L. 53.) 3 M. & Scott, 518.

^f Moore v. Bowmaker, 7 Taunt. 97. (2 Eng. C. L. 37.) 7 Price, 223. 2 Marsh. 392.

^g Austen v. Howard, 7 Taunt. 28. 327. (2 Eng. C. L. 14. 123.)

^h Dunbar v. Dunn, 10 Price, 54.

ⁱ Wilson v. Hobday, 4 M. & Scott, 120.

^j Anon. 5 Taunt. 776. (1 Eng. C. L. 261.)

^k Short v. Hubbard, 2 Bing. 445. (9 Eng. C. L. 474.)

^l Dias v. Freeman, 5 T. R. 195.

An action on a replevin bond was stayed at the instance of the sureties, upon paying into court the value of the goods distrained, and costs; the value to be ascertained by the prothonotary.^a

Extent of the liability of the sureties.

The sureties in a replevin bond are together liable only to the amount of the penalty in the bond, and the costs of the action,^b or for the value of the goods seized, and double costs.^c And if the penalty or value of the goods seized exceed the amount of the rent due at the time of the distress, they will be liable only for the rent.^d

*1347

*Where a sheriff took a replevin bond from one surety only, and he was sued thereon by the person making cognisance for having taken insufficient pledges, who recovered damages and costs in such action; held, that the sheriff having sued the surety on the bond for not having returned the goods, and suggested breaches according to the stat. of 8 & 9 W. III, c. 11, was not entitled to recover the costs incurred in defending the action against him as such sheriff; and that as the surety was precluded from calling on his co-surety for contribution, he was only liable to a moiety of the damages awarded by the jury in the action against the sheriff.^e

SECTION XII.

PROCEEDINGS AGAINST THE SHERIFF FOR TAKING INSUFFICIENT PLEDGES.

Case lies against the sheriff and his officers for taking insufficient pledges. If the sureties be *apparently*

WE have seen that the sheriff is bound to take pledges, or a bond, with sureties on replevying the goods, and that in case the bond be forfeited, the sureties are liable to be sued thereon it remains to be observed, that if the defendant obtain judgment in the replevin suit, and be unable to get satisfaction from the principal, or the sureties, he may maintain an action on the case against the sheriff, or the replevin clerk, for taking insufficient pledges.^f If at the time of taking the bond, the sureties be *apparently* responsible, the sheriff is not answerable for their sufficiency.^g Therefore it is sufficient, on the part of the

^a *Gingell v. Turner*, 3 Bing. N. C. 881. (32 Eng. C. L.)

^b *Hefford v. Alger*, 1 Taunt. 218.

^c *Hunt v. Round*, 2 Dowl. 558.

^d *Id.* *Ward v. Henley*, 1 Y. & J. 285.

^e *Austen v. Howard*, 1 Moore, 68. 7 Taunt. 28. 327. (2 Eng. C. L. 14. 123.) 2 Marsh. 352.

^f *Richards v. Acton*, 2 Bl. 1220. The Court of King's Bench refused an attachment against a sheriff for neglecting to take a replevin bond, as the party injured might bring an action. *Rex v. Lewis*, 2 T. R. 617. And see *Lesseyman v. Gildard*, 1 N. R. 292.

^g *Hindle v. Blades*, 5 Taunt. 225. (1 Eng. C. L. 86.) 1 Marsh. 27.

sheriff, in such an action, to show that the sureties are apparently persons of responsibility, although they were not actually such; unless it be shown that the sheriff had notice of the fact, or neglected the means of information within his power, and *did not act under the circumstances, and considering the information he had obtained, with a reasonable degree of caution and the general reputation as to the want of credit of the sureties, in the neighborhood of their respective residences, is evidence against the sheriff.^a

responsi-
ble, it is
sufficient.

*1348

But it seems that if the sureties reside out of the sheriff's bailiwick, he should search the office of the sheriff in whose bailiwick they reside, to ascertain whether any process had been sued out against them, before the bond is taken.^b This action is maintainable even after the avowant has taken an assignment of the replevin bond, and sued the principal and sureties thereon, if, through their insolvency or otherwise, he has not been able to obtain satisfaction; for the assignment of the bond is no waiver of any proceedings against the sheriff, as it is in the case of a bail bond.^c(1)

The declaration in this action should set forth the distress and replevin, and the proceedings in the suit, and state that it was the *duty* of the sheriff to take sufficient pledges, and that he neglected to do so, and that the plaintiff had not obtained a return of the goods, or their value. Where the declaration stated that the sheriff, instead of taking a bond from the plaintiff in replevin, and two sufficient sureties, took a bond from the plaintiff, and one surety, who was alleged to be insufficient; it was held ill for not alleging that the plaintiff in replevin was insufficient.^d If the replevin be for *damage feasant*, the declaration should show that a writ of *retorno habendo* had been issued, and *elongata* returned thereon.^e A count against the sheriff for not restoring the goods is bad, for his duty under stat. Westm. 2, is only to take pledges for that object.^f

The de-
claration.

+ this may be
distinct damage
feasant

Some evidence must be given by the plaintiff of the insufficiency of the pledges; but very slight evidence is sufficient to throw the *onus* of proof on the sheriff.^g The sureties themselves are competent witnesses to prove whether they are sufficient or not.^h It is unnecessary to prove the due execution of the bond, though averred in the declaration.ⁱ

Evidence.

*1349

^a Scott v. Waithman, 3 Stark. 168. (14 Eng. C. L. 176.)

^b Sutton v. Waite, 8 Moore, 27. (17 Eng. C. L. 96.)

^c 1 Saund. 195.

^d Hucker v. Gordon, 1 C. & M. 58.

^e *Id.*

^f *Id.*

^g B. N. P. 60.

^h 1 Saund. 195.

ⁱ Barnes v. Lucas, R. & M. 264. (21 Eng. C. L. 434.) Scott v. Waithman, 3 Stark. 168. (14 Eng. C. L. 176.)

(1) (Where an assignment was made by a sheriff of a replevin bond to the defendant in the replevin, who brought suit against the obligors and obtained judgment by confession against one of them, who was an inhabitant of another state, it was held that the remedy against the sheriff was suspended during the continuance of the proceedings upon the bond; and that a suit could not be maintained against him after such assignment without judicial evidence of the insolvency of the obligors. *Commonwealth v. Rees*, 3 Wharton, 124. The mere taking an assignment of a replevin bond does not discharge the sheriff. *Ibid.*)

Extent of
the liability
of the
sheriff.

With respect to the amount of damages for which the sheriff is liable in this action, the decisions are by no means uniform. It has been held in some cases, that the sheriff was liable to the amount of the rent in arrear, and also the costs in the replevin suit;^a in other cases, that as the verdict in replevin was only for a return of the goods, the damages should not exceed the value of the goods;^b yet it was decided in one case, that the plaintiff might recover damages beyond the penalty in the bond, that is, for more than double the value of the goods.^c But the court of Common Pleas afterwards held, that the good sense and justice of the case was, that the sheriff should be liable no farther than the sureties would have been if he had done his duty under stat. 11 Geo. II, c. 19, viz., to the amount of double the value of the goods distrained, but no farther.^d And this decision was recognised and acted upon in a very recent case.^e So that it seems to be now settled, that the liability of the sheriff is restricted to the amount of the penalty in the bond, *i. e.*, double the value of the goods distrained.

^a *Gibson v. Barnett*, cited in 4 T. R. 434. *Prowse v. Pattison*, B. N. P. 39. In this case the value of the goods exceeded the damages given. *Perreau v. Bevan*, 8 D. & R. 72; (11 Eng. C. L. 230;) here the damages were less than the penalty in the bond. *Scott v. Waithman*, 3 Stark. 168. (14 Eng. C. L. 176.)

^b *Yea v. Lethbridge*, 4 T. R. 433.

^c *Concannen v. Lethbridge*, 2 H. Bl. 39. And see *Baker v. Garrett*, 3 Bing. 56, (11 Eng. C. L. 27,) where Best, C. J., said, that cases might occur where the plaintiff might recover all the costs he had incurred in consequence of the insufficiency of the sureties. But the court there held, that the plaintiff could not recover as for special damages, beyond the penalty in the bond, the costs incurred by him in suing the sureties without effect, unless notice of his intention to sue thereon had been previously given to the sheriff.

^d *Evans v. Brander*, 2 H. Black. 547.

^e *Paul v. Gudluck*, 2 Bing. N. C. 220. (29 Eng. C. L. 314.) 1 Hodges, 370.

*CHAPTER XXI.

SLANDER.

	PAGE
I. Words actionable in themselves.	
II. Words spoken in respect of office, profession, &c.	1355
III. Words actionable only by reason of special damage	1357
IV. Slander of title	1359
V. Libel	1360
VI. Scandalum magnatum	1362
VII. Privileged communications	1363
VIII. Privileged publications	1371
IX. Disclosing the name of the author of the slander	1376
X. The declaration	1377
XI. The pleadings	1389
XII. Evidence	1393
XIII. Costs	1400

SECTION I.

WORDS ACTIONABLE IN THEMSELVES.

AN action on the case lies against a party for falsely and maliciously^a uttering or publishing words imputing to another any crime or misdemeanor, for which corporal punishment may be inflicted in a temporal court of criminal jurisdiction, or charging him with having an infectious disease, the imputation of which may exclude him from society. To support such action, the words must contain an express imputation of some crime liable to punishment, some capital offence, or other infamous crime or misdemeanor; and the charge upon the person spoken of must be precise. But to impute to any *man the mere defect or want of moral virtue, moral duties, or obligations, which render a man obnoxious to mankind, is not actionable.^b

What words are actionable

*1351

It has been held, that an action may be maintained for calling a person a traitor,^c murderer,^d sheep-stealer,^e pickpocket;^f or

^a "Malice, in common acceptation, means ill-will against a person, but, in its legal sense, it means a wrongful act done intentionally without just cause or excuse." Per Bayley, J., in *Bromage v. Prosser*, 4 B. & C. 255. (10 Eng. C. L. 321.) "Where the law implies such malice as is necessary to maintain the action, it is the duty of the judge to withdraw the question of malice from the consideration of the jury." *Id.*

^b Per De Grey, C. J., in *Onslow v. Horns*, 3 Wils. 177, recognised by *Lawrence, J.*, in *Holt v. Scholefield*, 6 T. R. 691. Where the penalty for an offence is merely pecuniary, it does not appear that an action will lie for charging it, even though in default of payment imprisonment should be prescribed by the statute. *Stark. on Sland.* 43.

^c Dal. 17. *Lewis v. Roberts*, Hard. 203.

^d 1 Roll. Ab. 72. Mo. 29.

^e 3 Bulst. 303.

^f 11 Mod. 255.

for charging another with felony,^a perjury,^b forgery,^c robbery.^d So the words, "you have done an act for which I can transport you," are actionable.^e So, calling a woman residing in the city of London, or in the Borough, "a whore," is actionable, for she is liable to be carted for such offence, in those places.^f So, to say of a person "he keeps a bawdy-house,"^g or to charge a brewer with selling unwholesome beer, is actionable; for they are indictable offences.^h So an action will lie for charging a person with having the leprosy,ⁱ or a venereal disease,^j or the falling sickness;^k if the charge imputes a continuance of the disorder at the time of speaking.^l

It would be inconsistent with the limited design of this work, to enumerate all the decisions as to what words are actionable, and what are not. It is observable, however, that the principle which governs all the cases, appears to be the degradation of the party in society, or his liability to criminal punishment. (1)

*1352 *It is not necessary, however, in order to enable the plaintiff to maintain this action, that the imputation against him might, if proved, subject him to any *future penalty*; for where the defendant said, "C. (the plaintiff) was in gaol, and tried for his life, and would have been hanged, had it not been for Leggatt, for breaking open the granary of farmer A. and stealing his bacon."^m So where the words were, "Thou wast in Launceston gaol for coining," to which the plaintiff replied, "If I was there, I answered it well." "Yes," said the defendant, "you were burnt in the hand for it."ⁿ It was held, in both cases, that the words were actionable, for they were injurious to the plaintiff's reputation, though they imported that the plaintiff had been acquitted in the one, and punished in the other; and therefore, that the plaintiff in neither of the cases, could be exposed to future punishment.^o But though in some instances the presumption of prejudice to the plaintiff in society is a ground of action, yet it may be laid down as an

^a Cro. Car. 376.

^b 1 Roll. Ab. 39. 1 Vin. Ab. 405.

^c Jones v. Herne, 2 Wils. 87.

^d Cro. Jac. 247. The words "he robbed J. W." were held to be actionable, (Littledale, J., *dissentiente*). Tomlinson v. Brittlebank, 4 B. & Ad. 630. (24 Eng. C. L. 128.) But in a subsequent case, the words "you have robbed me of one shilling tan money," were considered not to be actionable without an innuendo; for the court could not know "that tan money could be the subject matter of robbery." Day v. Robinson, 1 Ad. & Ell. 558. (28 Eng. C. L. 151.)

^e Curtis v. Curtis, 10 Bing. 477. (25 Eng. C. L. 206.)

^f 1 Vin. Ab. 395. Sid. 97. Brand v. Roberts, 4 Burr. 2418. *Id.* 2032.

^g Cro. Eliz. 643.

^h 1 Vin. Ab. 477. 6 Bac. Ab. 210.

ⁱ Taylor v. Perkins, Cro. Jac. 144.

^j 1 Roll. Ab. 66.

^k *Id.* 44.

^l Carslake v. Mapledoram, 2 T. R. 473.

^m Carpenter v. Tarrant, Rep. temp. Hard. 339.

ⁿ Gainsford v. Teke, Cro. Jac. 536.

^o See also Boston v. Tatham, *id.* 622, and 1 Stark. Sland. 19.

(1) (An action for slander will not lie in Pennsylvania for words spoken in another state, when the offence charged by those words is not indictable in that state, although indictable in Pennsylvania. *Barclay v. Thompson*, 2 Penna. 148.)

established rule, that no charge or imputation upon the plaintiff, however foul, (except that of having an infectious disease,) will be actionable, unless it be of an offence punishable in a temporal court of criminal jurisdiction.^a Words imputing an offence which is cognisable *only* in an ecclesiastical court; as imputing incontinence to females, and the like, are not actionable; for they concern matters merely spiritual, and the party defamed has a remedy in the Spiritual Court.^b

General words of abuse, as calling a man a rogue, a rascal, a swindler^c and the like, are not actionable, as they do not import any offence punishable in a temporal court. But the words, "You are a rogue, and I will prove you a rogue, *for you forged my name,*" are actionable, for they import a punishable offence.^d Though an imputation of perjury is action-
General words of abuse.

able, yet, to accuse a person of having *forsworn* himself is not actionable, unless it appear from accompanying circumstances that the defendant meant such forswearing as would constitute the offence of perjury; as where reference is made to a particular court, or some judicial proceeding, in which false swearing would amount to perjury.^e (1) Calling a man a thief is actionable, if it be thereby intended to impute a felony; as where the words were, "He is a thief, and robbed me of my bricks."^f But where the words were, "You are a bloody thief. Who stole my pigs? You did, you bloody thief, and I can prove it; you poisoned them with mustard and brimstone." The jury having found that the words were not intended to impute felony, it was held, that the plaintiff was not entitled to recover.^g If it appear from the context, or the plaintiff's own showing, that the word "thief," was not used in a felonious sense, the plaintiff will be nonsuited;^h otherwise it lies on the defendant to show that the word was not used in a felonious sense.ⁱ *1353 Forsworn. Thief.

^a See 1 Stark. 21.

^b Parratt v. Carpenter, Cro. Eliz. 502. Graves v. Blanchet, Salk. 696. 12 Mod. 106. 4 Co. 20.

^c Saville v. Jardine, 2 H. Bl. 531. 3 Bl. Com. 124. 1 Vin. Ab. 417. In Jones v. Herne, 2 Wils. 87, Willes, C. J., said, that "if it were now *res integra*, he should hold, that calling a man a rogue, or a woman a whore, in public company, was actionable."

^d Jones v. Herne, 2 Wils. 87.

^e Holt v. Scholesfield, 6 T. R. 691. Hall v. Weeden, 8 D. & R. 140. (14 Eng. C. L. 340.) 1 Roll. Ab. 39. 4 Co. 17. b. Croforde v. Blisse, 2 Bulst. 140. Shaw v. Thompson, Cro. Eliz. 609. "The reason is, because, 'forsworn' is applicable not only to perjuries punishable at law, but also to offences of the same description which incur no temporal punishment." Per Lord Denman, C. J., in Tomlinson v. Brittlebank, 4 B. & Ad. 632. (24 Eng. C. L. 128.)

^f Sloman v. Dutton, 10 Bing. 402. (25 Eng. C. L. 182.) B. N. P. 5.

^g Sibley v. Tomlins, 4 Tyr. 90. See Christie v. Cowell, Peake, 4. B. N. P. 5.

^h Thompson v. Bernard, 1 Camp. 48. Penfold v. Westcote, 2 N. R. 335.

(1) (Sherwood v. Chase, 11 Wend. 38. Dayton v. Rockwell, 11 Wend. 140. Gilman v. Lowell, 8 Wend. 573. Harvey v. Boies, 1 Penna. 12. Tipton v. Kahle, 3 Watts, 90. If the charge, however, be not palpably unfounded on the face of it, the risk of a prosecution which it induces shall be compensated in damages. Deford v. Miller, 3 Penna. 105.)

Stealing.

Whether a charge of "stealing" be actionable, depends upon the subject matter to which it is applied. If it appear that the term was not capable of being used in a felonious sense, it is not actionable. Thus, to accuse a man of stealing a tree, is not actionable, for the offence is a trespass, and not a felony.^a So where the words spoken in respect of a churchwarden were, "Who stole the parish bell-ropes?" innuendo, meaning that the plaintiff did; it was held, that they were not actionable; for the churchwarden has possession of the goods of

*1354

"the church, and could not be indicted for stealing the ropes."^b On the same principle, words imputing embezzlement to a person who was not a servant, or employed in the capacity of a servant, and who, therefore, could not, in the eye of the law, commit such an offence, were held not to be actionable.^c

But if the intention to charge the plaintiff with the commission of a crime plainly appears, no inconsistency will prevent the words from being actionable; as where the defendant's wife said, "Thou art a thievish rogue, for thou hast stolen my faggots;" it was held, that the words were actionable, though it was objected that a married woman could not have property of her own; for it was to be understood according to common intendment, that she charged the plaintiff with stealing her *husband's* faggots.^d

No action lies for these words, "I will take him to Bow Street on a charge of forgery," because the words do not *charge* the person of whom they are spoken with felony.^e But the words, "I think the present business ought to have the most rigid inquiry, for he (the plaintiff) murdered his first wife; that is, he administered improperly medicines to her for a certain complaint, which was the cause of her death," have been held to be actionable.^f So the words, "He was put in the roundhouse for stealing ducks at Crowland," are actionable.^g Whenever the words used are calculated to impress upon the minds of the hearers a suspicion of the plaintiff's having committed a criminal act, such an inference may and ought to be drawn, whatever form of expression may have been adopted. Thus, where the defendant said of the plaintiff, that "he was under a charge of a prosecution for perjury, and that *G. W.* (an attorney of that name) had the Attorney-General's directions to prosecute the plaintiff for perjury;" it was held to be actionable, as calculated to convey the imputation of perjury.^h

*1355

So, *where one said of another "that his character was infamous, &c.; that delicacy forbade him from bringing a direct

^a B. N. P. 5. Hob. 406.

^b Jackson v. Adams, 2 Bing. N. C. 402. (29 Eng. C. L. 371.) 1 Hodges, 339.

^c Williams v. Stott, 1 C. & M. 675.

^d Stamp v. White, Cro. Jac. 600. *Contra*, 1 Rol. Ab. 74. Charnel's Case, Cro. Eliz. 279.

^e Harrison v. King, 4 Price, 46. 7 Taunt. 431. (9 Eng. C. L. 165.)

^f Ford v. Primrose, 5 D. & R. 287. (16 Eng. C. L. 234.)

^g Beavor v. Hides, 2 Wils. 300.

^h Roberts v. Camden, 9 East, 93.

charge, but it was a *male child* who complained to him:" such words were understood to mean a charge of unnatural practices, and sufficiently certain in themselves to be actionable, without the aid of an *innuendo*.^a

Formerly a doctrine prevailed that words should be construed in their mildest sense, *in mitiori sensu*, even in direct opposition to the finding of the jury; as where the words were "thou art as arrant a thief as any in England, for thou hast broken up I.'s chest, and taken away 40/." After verdict for the plaintiff, judgment was arrested on the grounds that the words did not show the commission of a felony; for the money might have been taken away, and the chest broken open in the midday, and in the presence of divers; and if so, it was not a felony.^b But it is now an established rule of law, that both judges and juries shall understand words in that sense which the author intended to convey to the minds of the hearers, as evidenced by the circumstances of the case, and that it is the province of the jury to decide, (taking all the circumstances into consideration,) whether the words were spoken maliciously and with a view to defame the plaintiff; and for the court to determine, whether such words, taken in the sense imputed to them, form a good ground of action.^c(1)

Mitiori sensu.

Words are to be understood in the sense which the author intended to convey.

SECTION II.

WORDS SPOKEN IN RESPECT OF OFFICE, PROFESSION, ETC.

Words, not otherwise actionable, may form the basis of an action if spoken of a party in respect of his office, profession, trade, or business. Thus, to charge a justice of the peace with corruption, or a criminal breach of duty, is actionable, as it may tend to exclude him from that office.^d(2) But an action will not lie for calling a justice of the peace a fool, a blockhead, an ass, &c., "because," as was quaintly remarked by Holt, C. J., "it is not his fault that he is a blockhead, for he cannot be otherwise than his Maker made him, but if he had been a wise man, and wicked principles were charged upon him when he had not them, an action would lie; for though a man cannot be wiser he may be honester than he is."^e Where words are

Words spoken of a party in respect of his office, &c.
*1356

^a Woolnoth v. Meadows, 5 East, 463.

^b Forster v. Browning, Cro. Jac. 687.

^c Rex v. Horne, 1 Cowp. 672. R. v. Watson, 2 T. R. 206. Roberts v. Camden, *supra*. Read v. Ambridge, 6 C. & P. 308. (25 Eng. C. L. 412.)

^d Ayston v. Blagrove, Stra. 617. 2 Lord Raym. 1369. Herle v. Osgood, 1 Vent. 40.

^e Powe v. Frinn, Holt, 653. Salk. 694. Bill v. Neal, 1 Lev. 52.

(1) (Gibson v. Williams, 4 Wend. 320.)

(2) (Words spoken of a plaintiff—a judge—imputing official misconduct held to be actionable without colloquium or innuendo. Hook v. Hackney, 16 Serg. & R. 385.)

spoken of a person in an office of profit, which have a natural tendency to occasion a loss of such office, or which impute the want of some necessary qualification for, or some misconduct in it, they are actionable.^a

This action extends to all offices of trust or profit, without limitation, provided they be of a temporal nature. Thus, it extends to that of a churchwarden, a clerk of a public company, a town clerk,^b &c. So, it extends to words spoken of men in their profession as barristers and physicians, if they be practising at the time. Thus, to say of a barrister, "he is a dunce,"^c or of a physician, that "he is no scholar," is actionable.^d So, it extends to words said of clergymen, if they hold a preferment;^e and attorneys. The words, "he is no more lawyer than the devil,"^f "he deserves to be struck off the roll;"^g are actionable when spoken of an attorney. But it has been held that the words, "I have taken out a warrant to tax his bill;" "I'll bring him to book, and shall have him struck off the rolls;" were not actionable.^h To say to an attorney, "You are well known to be a corrupt man and to deal corruptly;" has been held actionable.ⁱ So, where the words were, "Thou art a false knave, a cozening knave, and hast gotten all that thou hast by cozenage, and thou hast cozened all that have dealt with thee."^j So, "Thou art a common barrator."

*1357

To say of an attorney, "He has defrauded his creditors, and has been horsewhipped off the course at Doncaster," is not actionable unless spoken of him in his profession.^k

Words if
spoken of
a mer-
chant or
tradesman

Any words tending to injure a merchant or a tradesman, or affecting a person in the particular art by which he gains his livelihood, are actionable.⁽¹⁾ To say of a corn factor, "You are a rogue and a swindling rascal; you delivered me 100 bushels of oats, worse by 6d. a bushel than I bargained for," is actionable, without proof of special damage.^l So, to say of a tradesman, "He lives by swindling and robbing the public," is actionable, though the transaction alluded to may amount only to a fraud.^m So to say of an innkeeper, "He is a bankrupt, he will be in the gazette in a twelvemonth, he is a pauper," has been held to be actionable, though at the time he was not liable to the bankrupt laws.ⁿ So to say of

^a Lumby v. Allday, 1 C. & J. 301.

^b 1 Stark. Sland. 124.

^c Peard v. Johnes, Cro. Car. 382.

^d 6 Bac. Ab. 215. Poph. 207. 2 Vent. 28.

^e 1 Roll. Ab. 58. See Musgrove v. Bovy, 2 Stra. 946.

^f Day v. Buller, 3 Wils. 59.

^g Phillips v. Janson, 2 Esp. 624.

^h Id.

ⁱ 4 Co. 16.

^j Jenkins v. Smith, Cro. Jac. 586.

^k Taylor v. Starkey, Cro. Car. 192.

^l Doyley v. Roberts, 3 Bing. N. C. 835. (32 Eng. C. L.)

^m Thomas v. Jackson, 3 Bing. 104. (11 Eng. C. L. 52.)

ⁿ Smith v. Carey, 3 Camp. 461.

⁽¹⁾ Whittaker v. Bradley, 7 D. & R. 649. (16 Eng. C. L. 310.) S. C. nom. Whittington v. Gladwin, 5 B. & C. 180. (11 Eng. C. L. 195.)

(1) (Sumner v. Uiley, 7 Conn. 259. Tobias v. Harland, 4 Wend. 537. Ostrom v. Calkins, 5 Wend. 263. Rathbun v. Emigh, 6 Wend. 407. Sewall v. Catlin, 3 Wend. 291.)

a stock-broker, "He is a lame duck;"^a of a pawnbroker, "He is a broken fellow;"^b to a milliner, "You are not worth a farthing;"^c of a husbandman, "He owes more than he is worth;"^d of a trader, "He hath nothing but rotten goods in his shop;"^e of a midwife, "Many have perished for her want of skill,"^f is actionable.

Saying of a commission agent that he is an unprincipled man, and borrowed money without repaying it, is not actionable without special damage.^g

SECTION III.

SPECIAL DAMAGE.

WORDS not actionable in themselves may become so by reason of special damage resulting from them. But to sustain such action, the words must be defamatory in their nature, and the special damage must be the fair and natural result of them. Thus, where the defendant said of the plaintiff, a shopwoman, "She secreted 1s. 6d. under the till," stating "these are not times to be robbed;" and the special damage alleged was, that by reason of the words, one S. refused to take the plaintiff into his service; after verdict for the plaintiff judgment was arrested, because the words were not in their nature defamatory or injurious to the plaintiff (it not appearing whose money it was.^b) So, where the special damage alleged was, the refusal of another person to employ the plaintiff, and it appeared that the refusal was founded *partly* on the defendant's words and *partly* on another circumstance; it was held, that the action was not maintainable, since the damage must be *wholly* attributable to the words.ⁱ So, where the defendant asserted that the plaintiff cut his master's cordage, and the damage alleged was that in consequence of these words the master discharged the plaintiff; held, not sufficient; for the alleged damage was not the natural consequence of the words; it was a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words other persons had thrown the plaintiff into a horse-pond by way of punishment.^j So where the defendant libelled a theatrical performer, in consequence of which she refused to sing; it was held, that the proprietor of the theatre could not main-

The words must be defamatory, and the special damage must have resulted from them *1358

The damage must be wholly attributable to the words.

^a Morris v. Langdale, 2 B. & P. 284.

^c 1 Stark. 140.

^e 1 Stark. Sland. 141.

^g Storey v. Challands, 8 C. & P. 234.

^h Kelly v. Partington, 5 B. & Ad. 645. (27 Eng. C. L. 144.) 3 N. & M. 117.

ⁱ Vicars v. Wilcocks, 8 East, 1.

^b Holt, 652.

^d Dobson v. Thorstone, 3 Mod. 112.

^f Flower's Case, Cro. Car. 211.

^j Id.

tain an action for the damage resulting to him from her refusal to attend; for the injury was too remote, and her refusal to sing might have proceeded from caprice or indolence.^a

But it is not necessary that the person whose act constitutes the special damage should have believed the defamatory charge provided that he acted in consequence of the words having been spoken.^b

Loss of marriage.

Loss of marriage is a sufficient damage to support this action, but the plaintiff must allege and prove that a marriage with some specific person was in contemplation, and was prevented by the speaking of the words.^c So is the loss of particular customers by a tradesman.^d So, to be deprived of substantial benefit arising from the hospitality of friends, is a sufficient *damage.* So, where in consequence of a charge of incontinence, the plaintiff was prevented from preaching and receiving voluntary donations from his congregation; it was held to be a sufficient special damage to support an action.^f

*1359

Where the plaintiff alleged special damage from the words spoken by the defendant; it was held, not to be supported by proof, that the defendant had spoken the words to *B.*, and that the damage ensued in consequence of *B.*'s repeating them as the words of the defendant.^g

SECTION IV.

SLANDER OF TITLE.

Words tending to disinherit son.

WORDS tending to the disinherison of a party or to impeach his title to land are actionable. As where the defendant said to the plaintiff who was heir apparent to his father and uncle, "Thou art a bastard;" it was held to be actionable, since by reason of the words the plaintiff might be in disgrace with his father and uncle, and they conceiving a jealousy of him touching the same might possibly disinherit him; and the law gives an action for a possibility of damage.^h But no action lies for

Slander of title must be attended

words affecting the present title of a plaintiff to an estate, without showing some special damage resulting from them, as that he was prevented from selling or making an advantageous dis-

^a *Ashley v. Harrison*, 1 Esp. 48. *Peake*, 194. See *Morris v. Langdale*, 2 B. & P. 284.

^b *Knight v. Gibbs*, 3 Nev. & M. 467. 1 Adol. & Ellis, 43. (28 Eng. C. L. 30.)

^c *Davis v. Gardiner*, 4 Co. 16. 1 Roll. 36.

^d B. N. P. 7. *Tilk v. Parsons*, 2 C. & P. 201. (19 Eng. C. L. 89.)

^e *Moore v. Meagher*, 1 Taunt. 39.

^f *Hartley v. Herring*, 8 T. R. 130.

^g *Ward v. Weeks*, 7 Bing. 211. (20 Eng. C. L. 104.) 4 M. & P. 796. And see *Rutherford v. Evans*, 6 Bing. 451. (19 Eng. C. L. 128.) 4 M. & P. 163.

^h *Humphreys v. Stanfield*, Cro. Car. 469. *Turner v. Stirling*, 2 Vent. 26.

position of it.^a If the defendant having probable cause, *bond fide* spoke the words, claiming title in himself, no action will lie.^b So, the attorney of a party claiming title is not liable to this action, if he *bond fide*, though without authority, makes such objections to the vendor's title as his principal would have been authorised in making.^c But where the plaintiff, having advertised for sale a bond executed to him by the defendant as a surety, the payment of which had been resisted in a long course of litigation in which the validity of the bond had been disputed; the defendant, pending a suit in error, published among the persons assembled to bid for the bond at an auction a statement of all the circumstances under which the bond was given, and alluding to the plaintiff, concluded, "His object is either to extract money from the pocket of an unwary purchaser, or what is more likely, by this threat of publication, to extort money from me;" held, that this exceeded the latitude allowed for privileged communications, or observations on titles by a party interested, and that it was a libel although no express malice was proved.^d

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actionable

*1360

It is a good answer to an action for slander of title, that the defendant acted *bond fide* in the communication which he made, believing it to be true.^e

SECTION V.

LIBEL.

THE preceding pages have been devoted to the consideration of oral slander or defamatory words actionable without special damage; it is now proposed to treat of a "libel." Though in ordinary acceptation a libel is not comprised in the term "slander," yet, in legal understanding the latter term embraces written as well as oral defamation; and as actions for libel are governed by the same principles as actions for words, it is deemed expedient to consider them under the same head.

A libel is a malicious defamation expressed in printing or writing, or by pictures or other signs, tending to injure the character of an individual or to diminish his reputation.^f "If any

Definition
of a libel.

^a *Snedes v. Badley*, 3 Bulstr. 74. 1 Vin. Ab. 553. *Gerrard v. Dickenson*, Cro. Elz. 196.

^b *Smith v. Spooner*, 3 Taunt. 246.

^c *Watson v. Reynolds*, M. & M. 1. (22 Eng. C. L. 231.)

^d *Robertson v. M'Dougall*, 4 Bing. 670. (15 Eng. C. L. 106.) 1 M. & P. 692.

^e *Pitt v. Donovan*, 1 M. & S. 639.

^f Bac. Ab. tit. Libel, 3 Bl. Com. 125. Hawk. P. C. Libel. A justice of peace out of sessions, before information filed, or indictment found, has jurisdiction, in the first instance, to issue his warrant to apprehend a party charged on oath with publishing a

*man deliberately or maliciously publish anything in writing concerning another which renders him ridiculous, or tends to hinder mankind from associating or having intercourse with him, an action will lie against such publisher."^a It follows therefore, that an action may be maintained for defamatory words published in writing or print, which would not have been actionable if merely spoken. Thus we have seen that to call a man generally "a swindler," is not actionable.^b Yet it has been held, that if published in print it is actionable.^c So, to publish of a man in writing, that he was "an itchy old toad, and stunk of brimstone," has been held to be actionable.^d So that he was "a villain,"^e though if spoken merely, an action would not lie. The grounds of the distinction between written and oral slander are, that the former is presumed to have been effected with coolness and deliberation and to be more permanent and propagate wider than words, which are frequently the effect of a sudden gust of passion, and may soon be buried in oblivion.^f

Where the defendant posted up in a public room the following notice: "The Rev. John Robinson and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room;" it was held not to be actionable; for the publication merely asserted the opinions of the defendants, that the plaintiff was not a proper person to be associated with them, not that he was an improper person for *general society*.^g

*1362 A person who pursues an illegal avocation, such as a public "room for pugilistic exhibitions, cannot maintain an action for a libel regarding his conduct in such avocation.^h So, an action for a libel does not lie for anything written against a party, touching his conduct in an illegal transaction; but for misconduct imputed to him in any matter independent of the illegal transaction, though arising out of it, an action lies.ⁱ But it is

libel, and require him to find bail; and, in default of sureties, to commit him to prison to abide his trial. *Butt v. Conant*, (Knt.) 4 Moore, 195. 1 B. & B. 548. (5 Eng. C. L. 186.) 1 Gow. 84.

^a Per Wilmot, C. J., in *Villers v. Mousley*, 2 Wils. 403. Tuam (Archbishop of) *v. Robeson*, 6 Bing. 409. *Thorley v. The Earl of Kerry*, 4 Taunt. 355. "Scandalous matter is not necessary to make a libel, it is enough if the defendant induce an ill opinion to be had of the plaintiff, or make him contemptible and ridiculous." Per Holt, C. J., in *Cropp v. Hilney*, 3 Salk. 226. And see *verba* Lord Hardwicke, C. J., in *Bradley v. Methwyn*, S. N. P. 1040. "An action is maintainable for slander, either written or printed, provided the tendency of it be to bring a man into hatred, contempt, or ridicule." Per Bailey, J., in *Macgregor v. Thwaites*, 3 B. & C. 33. (10 Eng. C. L. 6.)

^b *Ante*, 1352.

^c *J'Anson v. Stuart*, 1 T. R. 748.

^d *Villers v. Mousley*, 2 Wils. 403.

^e *Bell v. Stone*, 1 B. & P. 331.

^f 4 Bac. Ab. 449. 6 *id.* 203. *Rex v. Beare*, 1 Lord Raym. 414.

^g *Robinson v. Jermyn*, 1 Price, 11.

^h *Hunt v. Bell*, 7 Moore, 212. 1 Bing. 1. (8 Eng. C. L. 219.)

ⁱ *Yrisarri v. Clement*, 3 Bing. 432. (13 Eng. C. L. 36.)

actionable to publish of a man that he has been guilty of gross misconduct and insulted females in a barefaced manner.^a So, to publish of a Protestant bishop that he attempted to convert Catholic priests by offers of money and preferment.^b

Suspending a lamp or exhibiting an inscription opposite to the plaintiff's house insinuating that it was a house of ill fame, is a libel for which an action will lie.^c

SECTION VI.

SCANDALUM MAGNATUM.

DEFAMATORY words spoken of a peer, a judge, or other great officer of the state, are termed scandalum magnatum.

By stat. 2 R. II, c. 5, "none shall devise or speak false news, lies, or other such false things of the prelates, dukes, earls, barons, and other nobles and great men of the realm, and of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or the other, and other great officers of the realm, and he that doth shall incur the pain of the stat. Westm. I, c. 34," which is, "that he shall be taken and kept in prison until he hath brought him into court which was the first author of the tale;" and by 12 Ric. II, c. 11, "if such person cannot find him by whom the speech be moved, he may be punished by the advice of the council."

Though a remedy by action is not expressly given by these statutes, yet upon the principle that whenever a party is prejudiced by an act which is prohibited by the statute, he is entitled to damages, it has been held, that an action on the case lies as well on behalf of the crown, to inflict the punishment of imprisonment upon the slanderer, as on behalf of the party aggrieved to recover damages.^d Many words which are not actionable when spoken of a private individual are actionable when spoken of persons of high rank; thus, the following words spoken of a peer have been held to be actionable: "He is an unworthy man and acts against law and reason."^e "There is no more value in him than a dog."^f "He has no more conscience than a dog."^g "He is an oppressor."^h

*1363

^a Clement v. Chivis, 9 B. & C. 172. (17 Eng. C. L. 553.)

^b Tuam (Archbishop of) v. Robeson, 5 Bing. 17. (15 Eng. C. L. 350.)

^c Jefferies v. Duncombe, 2 Camp. 3. Spall v. Massey, 2 Stark. 559. (3 Eng. C. L. 474.)

^d 2 Inst. 118. Kirl. 26.

^e Lord Townsend v. Dr. Hughes, 2 Mod. 150.

^f Marquis of Dorchester's case, Crom. Jur. 1 Stark. Sland. 182.

^g The Duke of Buckingham's case, Roll. 1269.

^h The Earl of Leicester's case.

SECTION VII.

PRIVILEGED COMMUNICATIONS.

	PAGE		PAGE
1. Of privileged communications in general.		4. Criticisms of literary	1369
2. Characters of servants.	1366	works.	1370
3. Words used in legal or judicial proceedings.			

What
communi-
cations are
privileged.

*1364

1.—*Of privileged communications in general.*] WE have seen that malice is an essential ingredient in oral or written slander; it is observable, however, that when defamatory communications are published of another, the natural tendency of which is to defame and injure him, the law will infer that the defendant had acted maliciously, unless it appears that the communications were made on an occasion, and under circumstances, which the law regards as privileged. Whenever the author of the alleged slander acted in the *bonâ fide* discharge of any public or private duty, whether legal or moral, or in the prosecution of his own rights or interests, an action cannot be maintained against him without proof of malice in fact; "every wilful unauthorised publication," said Parke, B., "injurious to the character of another, is a libel; but where the writer is acting on any duty, legal or moral, towards the person *to whom he writes, or where he has, by his situation, to protect the interests of that person, that which he writes under such circumstances is a privileged communication, and no action will lie for what is thus written, unless the writer be actuated by malice."^a A privileged communication means nothing more than, that the occasion of making it rebuts the *primâ facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the onus of proving malice in fact, but not of proving it by extrinsic evidence only; he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it.^b

Instances
of privi-
leged
communi-
cations.

The following are instances of communications which have been held to be privileged and not actionable without proof of malice:—Words spoken in confidence and friendship, as a caution; of a tradesman, that he would soon be a bankrupt.^c A letter written confidently to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns, which they had intrusted to him, and in which B., the writer of the letter, was

^a Per Parke, B., in *Cockayne v. Hodgkinson*, 5 C. & P. 543. (24 Eng. C. L. 448.)

^b *Wright v. Woodgate*, 2 C. M. & R. 573. 1 Tyr. & G. 12. 1 Gale, 333.

^c *Herver v. Dowson*, B. N. P. 8. See *Cleaver v. Sarraude*, cited in 1 Camp. 268.

likewise interested.^a Communications made to a member of a dissenting congregation, respecting an individual about to be appointed a minister of that congregation.^b Communications made by a landlord to a tenant respecting the character of the inmates of the house occupied by the tenant.^c A letter written by a private individual to a public officer complaining of the misconduct of a person under him.^d A letter written to the secretary of the general post office complaining of misconduct in a postmaster, as a *bond fide* complaint.^e A letter written by a tenant to his landlord, (in consequence of a request by the landlord to be informed respecting his game,) stating that *his gamekeeper sold game.^f So, information given by the serjeant of a volunteer corps to the committee of management, that the plaintiff was an improper person to remain a member of their corps.^g The memorial of a tradesman addressed to the secretary at war, complaining of the conduct of a half-pay officer in the army, for not having paid a debt due to him, and stating the facts of his case fairly and honestly, according to his opinion and understanding of such facts, is a privileged communication.^h(1)

But a letter written by an opposing creditor to a commissioner of the Insolvent Debtors' Court previously to the hearing of the insolvent's case, is not a privileged communication;ⁱ nor is a letter written by a navy officer to Lloyd's coffee-house about the conduct of the captain of a transport ship of which the officer was superintendent; for he has no right to make communications upon subjects with which he becomes acquainted in his professional capacity, except to the government.^j Where a person originated false reports prejudicial to a tradesman, and on being called upon to examine into the grounds of such reports, repeated them, it was held not to be a privileged communication.^k

A public communication made by a voter to the electors, respecting the private character of a candidate, is not a privileged publication.^l

Words spoken by one member of a charitable association to another respecting the conduct of a medical man employed by

^a *M'Dougall v. Claridge*, 1 Camp. 267.

^b *Blackburn v. Blackburn*, 4 Bing. 395. (15 Eng. C. L. 14.) 1 M. & P. 33.

^c *Knight v. Gibbs*, 1 Ad. & Ell. 43. (28 Eng. C. L. 30.)

^d *Blake v. Pilfold*, 1 M. & Rob. 198.

^e *Woodward v. Lander*, 6 C. & P. 548. (25 Eng. C. L. 537.)

^f *Cockayne v. Hodgkinson*, 5 C. & P. 543. (24 Eng. C. L. 448.)

^g *Barbaud v. Hookham*, 5 Esp. 109.

^h *Fairman v. Ives*, 1 D. & R. 252. 5 B. & A. 642. (7 Eng. C. L. 220.)

ⁱ *Gould v. Hulme*, 3 C. & P. 625. (14 Eng. C. L. 491.)

^j *Harwood v. Green*, *Id.* 141. (14 Eng. C. L. 245.)

^k *Smith v. Mathews*, 1 M. & Rob. 151. ^l *Duncombe v. Daniell*, 8 C. & P. 222.

(1) (A remonstrance against a tavern licensee. *Vandersee v. M'Gregor*, 12 Wend. 545. *Flitcraft v. Jenks*, 3 Wharton, 158.)

the association are not privileged.^a But it might be otherwise, if the words formed part of the proceedings of a meeting of the body convened to inquire into the conduct of the medical man.^b

Where the defendant, having some cause for suspicion, went to plaintiff's relations, and charged him with theft, it appearing, however, that his object in making the communication was rather to compromise the felony than to promote inquiry, or to enable the relations to redeem the plaintiff's character; it was held, not to be a privileged communication.^c

*1366 So where a letter to the manager of a property in Scotland, in which the plaintiff and defendant were jointly interested, related principally to the property, and the plaintiff's conduct respecting it, but it also contained a passage reflecting on his conduct to his mother and aunt; held, that the latter part could not be privileged as a confidential communication.^d

Any thing published *bond fide* with a view of investigating a fact in which the party publishing it is interested is also privileged, however injurious the matter published may be to another person. As where the defendant, at the instance of the plaintiff's wife, published an advertisement, imputing a charge of bigamy to the plaintiff; Lord Ellenborough, C. J., held, that as it was published at the instance of the wife, with a view of discovering whether the plaintiff had another wife living at the time he married her, that being a fact in which she was interested, the publication was justifiable, however injurious it might be to the plaintiff.^e

But if the object could be obtained by means less injurious, or if the publication be more extensive than is necessary for the purpose of obtaining the desired information, it will be actionable.^f

Anything said *bond fide* in giving a character of a servant, is privileged. 2.—*Characters of servants.*] Questions respecting privileged communications principally arise in actions brought by servants against their former masters, for giving them an unfavorable character. The general rule is, that "any thing said or written by a master when he gives the character of a servant, is a privileged communication; and to support an action for any communication made by a master on such occasion, the plaintiff must prove that it was *malicious*."^g But if the

^a Martin v. Strong, 2 H. & W. 336. 1 N. & Perr. 29.

^b *Id.*

^c Hooper v. Truscott, 2 Bing. N. C. 457. (29 Eng. C. L. 395.)

^d Warren v. Warren, 4 Tyr. 850. 1 C. M. & R. 150.

^e Delany v. Jones, 4 Esp. 191.

^f Brown v. Croome, 2 Stark. 297. (3 Eng. C. L. 353.)

^g Edmonson v. Stephenson, B. N. P. 8. Weatherstone v. Hawkins, 1 T. R. 110. Per Lord Mansfield, 4 Burr. 2425. "The rule laid down by Lord Mansfield, in Edmonson v. Stephenson, has been followed ever since. It is, that in an action for defamation in giving a character of a servant, the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved." Per Parke, J., in Child v. Affleck, 9 B. & C. 406, (17 Eng. C. L. 405,) *post*, 1368. But see Kelly v. Partington, *post*, 1368.

communication be not made *bond fide*, it does not fall within the protection which the law extends to privileged communications.* “Unquestionably,” *said Lord Alvanley, “the master who has given a bad character of a servant to persons inquiring after his character, is not bound to substantiate by proof what he has said; but it is equally clear that the servant may, if he can, prove the character *to be false*, and the question between the master and servant will always in such case be, whether what the former has spoken concerning the latter be malicious and defamatory.”^b *1367

“Upon the question,” said Littledale, J., “whether the master who has written a libel in giving the character of a servant has acted *bond fide* or not, it may make a very material difference, whether he volunteered to give the character, or had been called upon to do so. At all events, when he volunteers to give a character, stronger evidence will be required that he acted *bond fide*, than where he has given a character after being required to do so.”^c But in the same case, Bayley, J., said, “that a master may (when he thinks that another is about to take into his service one whom he knows ought not to be taken) set himself in motion, and do some act to induce that other to seek information from him, and put questions to him. The answers to such questions, given *bond fide*, with the intention of communicating such facts as the party ought to know, will, although they contain slanderous matter, come within the scope of privileged communications. But in such a case, it will be a question for the jury whether the defendant has acted *bond fide*, intending honestly to discharge a duty, or whether he has acted maliciously, intending to do an injury to the servant.” In the case which gave rise to the preceding observations, the defendant wrote a letter to *B.*, who was about to engage the servant, informing him that he, the defendant, had discharged such servant for misconduct; *B.* in answer desired further information, upon which the defendant wrote a second letter, stating the grounds upon which he discharged the servant; in an action by the servant for a libel contained in the second letter; the court held, that assuming that letter to be a privileged communication, yet, as the defendant had invited the *inquiry, it was properly left to the jury to consider, whether it was written by the defendant, *bond fide*, or with an intention to injure the servant, and the jury found a verdict for the plaintiff.^d But where the defendant, in answer to inquiries respecting the character of the plaintiff, who had been his servant, wrote a letter imputing misconduct to her whilst in his service, and *after she left it*; and also made similar parol state- Where a master volunteers to give a character. *1368

* Per Bayley, J., in 8 B. & C. 584, (15 Eng. C. L. 305,) *infra*. Per Lord Ellenborough, C. J., in Hodgson v. Scarlett, 1 B. & A. 240.

^b Per Lord Alvanley, C. J., in Rogers v. Sir Gervase Clifton, 3 B. & P. 587.

^c Per Littledale, J., in 8 B. & C. 585. (15 Eng. C. L. 305.)

^d Pattison v. Jones, 8 B. & C. 578. (15 Eng. C. L. 305.)

ments to two other persons who had recommended such servant; it was held, that the letter was a privileged communication, and that the parol statements did not imply malice, and that the plaintiff was properly nonsuited.^a

Where the defendant, on being asked respecting the character of his servant, charged her with theft; a friend of hers afterwards proposed to inquire into the grounds of the charge, but the defendant refused to give satisfactory information on the subject; upon which the friend remonstrated, saying that "if she (the servant) had not friends, she might have gone upon the town;" and the defendant said, speaking of himself and his wife, "what is that to us?" held, that this conduct was evidence (though slight) to go to the jury, that the communication was made maliciously. "When it is clear," said Lord Denman, C. J., "that the words complained of are nothing more than a communication from one master to another, informing him of the character of a servant, the case certainly ought not to go to the jury; but where there are other circumstances from which malice may be inferred, the question is for them to decide."^b

General
result of
the autho-
rities.

The fair inference from the authorities is, that if the conduct of the defendant entirely consists of an answer to an inquiry, the absence of malice will be presumed, and the plaintiff will be nonsuited, unless he produces evidence of malice; but if a master unasked, officiously gives a bad character of a servant, or if his answer to an inquiry is attended with other circumstances from which malice may be inferred, it will be a question for the jury whether he acted *bonâ fide*, or was actuated by malice.^c *Proof of the falsehood of the communication is evidence of malice, but it is not necessary for the maintenance of this action, though formerly it was considered otherwise.^d

*1369

Where the plaintiff, knowing the character which the master would give, procured a character from him with a view of founding an action upon it; it was held that he could not recover.^e

Words
used in ju-
dicial pro-
ceedings
are privi-
leged.

3.—*Words used in legal or judicial proceedings.*] Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used, are protected by the occasion, and cannot form the foundation of an action for slander without proof of express malice, as by showing that the defendant knew at the time that the charge was false; for it would be a matter of public inconvenience, and operate to deter persons from preferring their complaints against offenders, if words spoken in the course of their giving

^a Child v. Affleck, 9 B. & C. 403. (17 Eng. C. L. 405.)

^b Kelly v. Partington, 4 B. & Ad. 700. (24 Eng. C. L. 144.)

^c Rogers v. Clifton, Pattison v. Jones, Child v. Affleck, Kelly v. Partington, *supra*.

^d In Weatherstone v. Hawkins, 1 T. R. 112, Buller, J., said that it was incumbent on the plaintiff to prove that the charge was malicious as well as false.

^e King v. Waring, 5 Esp. 14.

charge of them, or preferring their complaint, should be deemed actionable.^a(1) Thus, an action will not lie for words spoken on giving a party in charge to a constable, or in preferring a complaint to a magistrate.^b Nor where a man, upon reasonable grounds of suspicion, charges an innocent person with a theft.^c Nor if a servant summon his master before a court of conscience for wages, and the latter, in his necessary defence utter words imputing felony to the former.^d Nor for words spoken in a court of justice in a man's own defence against a charge therein preferred against him.^e

Where a court martial, after stating in their sentence the acquittal of an officer against whom a charge had been preferred, subjoined thereto a declaration of their opinion, that the charge was malicious and groundless, and that the conduct of the prosecutor, in falsely calumniating the accused was highly injurious to the service; it was held, that the president of the court martial was not liable to an action for a libel for having delivered such sentence and declaration to the judge advocate.^f

On the same principle whatever is said by a barrister or advocate in the conduct of a cause, relevant to the subject matter, is privileged, and not actionable.^g So, no action lies for any thing *said* by a member of parliament in the house; but the privilege does not extend beyond the walls of the house; and if a member of either house publishes his speech, he is as liable as a private individual to be prosecuted for any libellous matter which it may contain.^h

It is established by numerous authorities, that an action cannot be maintained for anything said or otherwise published, either by a judge, a party, or a witness in the due course of a judicial proceeding, whether civil or criminal.ⁱ

4.—*Criticisms of literary works.*] Criticisms on literary productions and works of art publicly exhibited may also be ranked in the class of privileged communications. It is esta-

^a Per Lord Eldon, C. J., in *Johnson v. Evans*, 3 Esp. 32.

^b *Id.* But where *A.* obtained a warrant to search the house of *B.* for goods suspected to be stolen, and in accompanying the officer to execute the warrant, told him that *B.* had robbed him; held, not a privileged communication. *Doncaster v. Hewson*, 2 M. & R. 176.

^c *Fowler v. Homer*, 3 Camp. 294. And see *Wood v. Brown*, 1 Marsh. 522. 6 Taunt. 169. (1 Eng. C. L. 347.)

^d *Trotman v. Dunn*, 4 Camp. 211.

^e *Astley v. Younge*, 3 Burr. 807.

^f *Jekyll v. Sir John Moore*, 2 N. R. 341. 6 Esp. 63. And see *Warden v. Bailey*, 4 Taunt. 67. *Home v. Lord Bentinck*, 1 Moore, 563. 2 B. & B. 130. (6 Eng. C. L. 46.)

^g *Wood v. Guston*, Styles, 462. *Brooke v. Sir Henry Montague*, Cro. Jac. 90. *Hodgson v. Scarlett*, 1 B. & A. 239. See *Flint v. Pike*, 4 B. & C. 473. (10 Eng. C. L. 380.)

^h *Rex v. Lord Abingdon*, 1 Esp. 226. *R. v. Creery*, 1 M. & S. 273.

ⁱ See 1 Stark. Sland. 240, *et seq.*

(1) (*Allen v. Croquet*, 2 Wend. 515.)

- blished by a variety of authorities, that a fair and candid, though erroneous criticism of any publication, however poignant it may be, and however severely it may reflect upon the author, so far as he has embodied himself with his work, cannot form the foundation of an action, unless it appears that the defendant under a pretext of criticising the work, indulged in personal defamation against the author, unconnected with the publication.* “One writer,” said Lord Ellenborough, C. J.,
- *1371 “in exposing *the follies and errors of another, may make use of ridicule, however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interest of the person ridiculed suffer, it is *damnum absque injuria*. Where is the liberty of the press if an action can be maintained on such principles? Liberty of criticism must be allowed or we should neither have purity of taste, nor of morals. We really should not cramp observations upon authors and their works; they should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous. Reflections upon *personal character*, is another thing. Show me an attack upon the moral character of the plaintiff, or an attack upon his character, unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule.”^b

SECTION VIII.

PRIVILEGED PUBLICATIONS.

	PAGE		PAGE
1. Parliamentary proceedings.		2. Judicial proceedings.	1373

Publications under the authority of either house of parliament, are privileged

1.—*Parliamentary proceedings*.] PUBLICATIONS duly made in the ordinary course of parliamentary proceedings are privileged, and therefore not actionable. As where a false and scandalous libel was contained in a petition which the defendant caused to be printed and delivered to members of a committee of parliament, appointed by the House of Commons to hear and examine grievances; it was held, that an action would not lie for it; but the court said, that if copies had been distributed to any but members of parliament, it would have been actionable.^c

^a Carr v. Hood, 1 Camp. 355. Macleod v. Wakeley, 3 C. & P. 311. (14 Eng. C. L. 392.) Thompson v. Shackell, M. & M. 187. (22 Eng. C. L. 286.) Tabart v. Tipper, 1 Camp. 350. Fraser v. Berkeley, 7 C. & P. 621. (32 Eng. C. L.)

^b Per Lord Ellenborough, C. J., in Carr v. Hood, 1 Camp. 354. And see Stuart v. Lovell, 2 Stark. 73. Herriott v. Stuart, 1 Esp. 437.

^c Lake v. King, 1 Saund. 131. 1 Lev. 240. 1 Sid. 414.

But a difference of opinion prevails, whether the publication *of parliamentary proceedings, for any other purpose than for the use of members of parliament, is privileged. Upon an information against the speaker of the House of Commons for publishing "Dangerfield's Narrative," he pleaded that the narrative was printed and published as a parcel of the proceedings; yet the court held that it was no defence.^a But in a subsequent case, the court of King's Bench refused to grant a criminal information for a libellous paragraph which was contained in the report of a committee of the House of Commons, a literal copy of which the defendant had published; Lord Kenyon observing, that it was impossible to admit that the proceedings of either house of parliament was a libel, and the court expressed their disapprobation of the preceding case.^b *1372

Yet, in a very recent case, where an action was brought against the defendant for a libel contained in a report of the inspectors of prisons, which was printed and sold to the public by the defendant in conformity to the express orders of the House of Commons, Lord Denman held, that it was not a privileged publication. "I am not aware," said his lordship, "of the existence in this country of any body whatever that can privilege any servant of theirs to publish libels of any individual. Whatever arrangements may be made between the House of Commons and any publisher in their employ, I am of opinion that the publisher who publishes that in his public shop, and especially for money, which may be injurious, and possibly ruinous to any one of the king's subjects, must answer in a court of justice to that subject, if he challenge him for a libel; and that the fact of the House of Commons having directed the defendant to publish all their parliamentary reports, is no justification for him or for any bookseller who publishes a parliamentary report containing a libel against any man." In this case, however, a verdict was given for the defendant on a plea justifying the truth of the publication.^c

In consequence of the preceding observations, the House of Commons passed the following resolutions: "That the power of *publishing such of its reports and proceedings as it shall deem necessary, is an essential incident to the constitutional functions of parliament. *1373

"That by the law and privilege of parliament, this house has the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges, and that the institution or prosecution of any action, suit, or other proceeding for the purpose of bringing them into discussion for decision before any tribunal *directly* or *incidentally* elsewhere than in parliament, is a high breach of such privilege, and renders all par-

^a R. v. Williams, 2 Show. 471.

^b Rex v. Wright, 8 T. R. 293.

^c Stockdale v. Hansard, in K. B., MS. Sitt. after H. T. 1837. 7 C. & P. 731. (32 Eng. C. L.)

ties concerned therein answerable to its displeasure, and to the punishment consequent thereon."

A fair, full, and accurate report of proceedings in a court of justice is privileged.

2.—*Judicial proceedings.*] It may be laid down as a general rule, that an action cannot be maintained in respect of a fair and impartial report of proceedings in a court of justice. "Trials at law," said Lord Ellenborough, C. J., "fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue so privileged; the benefit they produce is great and permanent, and the evil that arises from them is rare and incidental."^a The doctrine here laid down must, however, be taken with some qualification; for on another occasion,^b his lordship said, "that it must not be taken for granted that the publication of every matter which passed in a court of justice, was under *all circumstances*, and with *whatever motive* published, justifiable, for it often happens that circumstances necessary for the sake of public justice to be disclosed by witnesses in a judicial inquiry, were very distressing to the feelings of individuals." And it was laid down by the court of King's Bench, in granting a criminal information for the publication of a correct account of what had taken place at a trial, in the course of which the whole of Paine's Age of Reason had been read, that though, as a general proposition, it was certainly lawful to publish the proceedings of courts of justice, yet, that it must be taken with this qualification, *that what is contained in the publication must be neither defamatory of an individual, tending to excite disaffection, nor calculated to offend the morals of the people.*

*1374

It has, however, never been solemnly decided, whether, in an action for a libel, it is a good defence, under all circumstances, that the publication complained of, was a fair and accurate report of what took place in a court of justice. In *Curry v. Walter*,^d the court considered that it was; but as that matter was not specially pleaded, they doubted whether the defendant could avail himself of it under the general issue, and no judgment was given. Lord Ellenborough,^e however, and Bayley, J.,^f on different occasions dissented from the doctrine laid down in *Curry v. Walter*, observing, "that it must be understood with very great limitations." The question was lately discussed in the court of Exchequer in an action for a libel, which was comprised in the speech of counsel, severely reflecting upon the present plaintiff in a cause in which he was not a party, but in which he made an affidavit; the defendant pleaded that the publication complained of was a fair

^a *Rex v. Fisher*, 2 Camp. 563. And see *Curry v. Walter*, 1 B. & P. 525, where it was held that a true report of what passed in a court of justice was not actionable.

^b In *Stiles v. Nokes*, 7 East, 493.

^c *Rex v. Carlile*, 3 B. & A. 167.

^d 1 B. & P. 525.

^e In *Rex v. Creevy*, 1 M. & S. 273.

^f In *Rex v. Carlile*, 3 B. & A. 169. (5 Eng. C. L. 252.)

and accurate report of the proceedings which had taken place in the court of King's Bench, to which the plaintiff demurred, whereby the broad question was raised. During the argument, Lord Lyndhurst, C. B., intimated a strong opinion that the plea was a good answer to the action. Bayley, B., hesitated. The court not being able to agree, the case was directed to be argued a second time; but both these learned judges shortly afterwards retired from the bench, and the case dropped.*

Such publication, however, to be privileged, must be a fair, accurate, and unvarnished statement of what took place at the trial; the least misrepresentation of the facts, or even any high coloring of the circumstances, will deprive it of the protection which the law affords to reports of judicial proceedings. "It is an established principle," said Tindal, C. J., "upon which the privilege of publishing a report of any judicial proceedings *is admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms strictly and properly the legal proceedings."^b Thus, where a libel, which was contained in a report of proceedings before the lord mayor at the Mansion House, after stating the evidence, set forth an observation made by the chief clerk, as follows, "that it was exceedingly improper, under any circumstances, to obtain the signature of the complainant, a mere boy, to bills of exchange;" held, not to be justifiable, as it was a substantive reflection on the character of the plaintiff, and not made in the course of any judicial proceeding by any one whose duty called upon him to make it; for the chief clerk for that purpose must be considered as an entire stranger.^c So where the defendant justified, as being a fair and accurate report, &c., and the paragraph was headed by the words "shameful conduct of an attorney;" it was held, that the justification could not be supported.^d A publication of the *result* of the evidence is not privileged; the evidence itself should be published.^e Neither is a publication of a counsel's speech, unaccompanied by the evidence.^f

*1375

The publication of preliminary or *ex parte* proceedings in a police office, or before a justice of the peace,^g or before a coro-

* — *v. Lawson*, Court of Ex. E. T. 1834. See *Lewis v. Clement*, 3 B. & A. 702. (5 Eng. C. L. 427.)

^b Per Tindal, C. J., in delivering the judgment of the court in *Delegal v. Highley*, 3 Bing. N. C., 690. (32 Eng. C. L.)

^c *Id.*

^d *Lewis v. Clement*, 3 B. & A. 702, (5 Eng. C. L. 427,) (in error,) 3 B. & B. 297. (7 Eng. C. L. 444.) See *Stiles v. Nokes*, 7 East, 493. *Roberts v. Brown*, 10 Bing. 519. (25 Eng. C. L. 224.) 4 M. & Scott, 407.

^e *Lewis v. Walter*, 4 B. & A. 605. (6 Eng. C. L. 235.)

^f *Flint v. Pike*, 4 B. & C. 473. (10 Eng. C. L. 380.) *Saunders v. Mills*, 6 Bing. 213. (19 Eng. C. L. 60.)

^g *Duncan v. Thwaites*, 3 B. & C. 556. (10 Eng. C. L. 179.) *Rex v. Lee*, 5 Esp. 123. *Rex v. Fisher*, 2 Camp. 663. And see *McGregor v. Thwaites*, 3 B. & C. 24. (10 Eng. C. L. 6.) In *Delegal v. Highley*, *supra*, the court evaded this point, though it was raised, it not being necessary to give their opinion on it.

ner,* is not privileged; for such publications have a tendency to impede the due administration of justice, by preventing a fair trial.

*1376

*SECTION IX.

DISCLOSING THE NAME OF THE AUTHOR OF THE SLANDER.

It was ruled, in a very early case, that if a party, in repeating slanderous words, which he has heard from another, discloses the name of the author, he will not be liable to an action for such slander; but if he asserts the slander generally, without stating who told him, it is actionable.^b It has been held, that in order to exempt the repeater of slander from liability, he should mention the name of the party from whom he heard it, at the time; that it was not sufficient to disclose the name in a plea to an action for such slander;^c and that he should also give the *very words used* by the author, the effect of the words not being sufficient, in order that the party injured might have a cause of action against him.^d

The doctrine laid down in Lord Northampton's case, has, however, been frequently disapproved of in modern times. In *De Crespigny v. Wellesley*,^e it was held not to apply to written slander; and it has at length been overruled by a recent case, wherein it was decided, that it is no answer to an action for oral slander, for the defendant to show that he heard it from another, and named the person at the time, without showing that he believed it to be true, and that he spoke the words on a justifiable occasion. Parke, J., expressly stated that the resolution in Lord Northampton's case could not be law, and that in this respect no satisfactory distinction could be made between oral and written slander.^f(1)

* *Rex v. Fleet*, 1 B. & A. 379.

^b *Lord Northampton's Case*, 12 Co. 133.

^c *Davis v. Lewis*, 7 T. R. 17. *Woolnoth v. Meadows*, 5 East, 463.

^d *Maitland v. Goldney*, 2 East, 456. *Mills v. Spencer*, Holt, 533. (3 Eng. C. L. 177.)

^e 5 Bing. 392. (15 Eng. C. L. 474.) See *Lewis v. Walter*, 4 B. & A. 605. (6 Eng. C. L. 535.)

^f *M'Pherson v. Daniels*, 10 B. & C. 263. (10 Eng. C. L. 69.) 5 M. & R. 251. And see *Bennett v. Bennett*, 6 C. & P. 588, (25 Eng. C. L. 552,) where Alderson, B., held that stating the name of the author was no justification; but he admitted evidence of the fact in mitigation of damages. *Saunders v. Mills*, 6 Bing. 213. (19 Eng. C. L. 60.)

(1) (*Kellogg v. Cary*, 3 Penna. 102. *Smith v. Buckeher*, 4 Rawle, 295. *Henry v. Narwood*, 4 Watts, 347. *Long v. Brougher*, 5 Watts, 439.)

SECTION X.

THE DECLARATION.

THE venue in an action for defamation is transitory, and Venue. may be laid in any county. If however, it be laid in a county in which the slander was not published, it may be changed on affidavit. But if a libel be written or printed in one county, and circulated in others, the court will not change the venue to the first; for as every publication is a fresh offence, the defendant cannot swear that the cause of action was confined to any one county.^a Where a libel was written in England, and published abroad, the venue was changed on an affidavit, that the cause of action arose in the county in which it was written, and not elsewhere in the kingdom.^b

Two or more persons may join in this action, if their joint Parties to interest has been affected by the defamation, so that if slander- action. ous words be spoken, or a libel published of partners in the way of their trade, they may join in the action.^c But unless their joint interest be affected, they cannot sue jointly, each must bring a separate action.^d Where an act of parliament empowered a company to commence actions for enforcing claims due to them, and to prefer indictments in the name of their chairman, it was held, that the chairman might institute an action in his own name for a libel on the company, though it was not a corporate body.^e Husband and wife must join in Husband an action for words actionable in themselves spoken of the and wife. wife, if there be no special damage laid, for the action survives to the wife.^f But where the words are not actionable in themselves, but are *attended with special damage, the wife must *1378 be joined, for the damage resulting to the husband is the sole ground of action. Therefore, where the wife lived separate from the husband, and supported herself by keeping a boarding-house. and the defendant spoke defamatory words of her, imputing to her insolvency and prostitution, whereby she lost her credit, and was otherwise injured in her business; it was held, that the words being only actionable in respect of the

^a Pinkney v. Collins, 1 T. R. 571. Clissold v. Clissold, *Id.* 647. Hoskins v. Ridgway, 1 Stark Sland. 342.

^b Metcalf v. Markham, 3 T. R. 652.

^c Forster v. Lawson, 3 Bing. 452. (13 Eng. C. L. 48.) 11 Moore, 360. Maitland v. Goldney, 2 East, 425. Cook v. Batchelor, 3 B. & P. 150. See 2 Saund. 116, a. But in a joint action of libel by two partners, damages cannot be given for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business. Haythorn v. Lawson, 3 C. & P. 196. (12 Eng. C. L. 268.)

^d Smith v. Croker, Cro. Car. 512.

^e Williams v. Beaumont, 10 Bing. 260. (25 Eng. C. L. 124.)

^f Com. Dig. Bar. & Fem. Roll. Ab. 347. B. N. P. 7.

damage to the business, and that damage being solely the husband's, the wife ought not to be joined in an action for the slander.^a

If a libel be published by two or more persons jointly, as where it is contained in affidavits made by two, but so connected as to form but one charge, they may be sued jointly.^b But two cannot be sued jointly in an action for words.^c Even though the husband and wife speak the same words, a joint action will not lie against them.^d

The inducement.

It is usual, but unnecessary, to preface the declaration with an inducement of the plaintiff's good character and his innocence of the crime imputed to him.^e Such allegation is, however, not traversable.^f If the words or libel do not *per se* convey the meaning which the plaintiff wishes to assign to them, or if the charge be not necessarily slanderous, or requires explanation with reference to some extrinsic fact, to render it actionable, the plaintiff must, by way of an introduction or inducement, state that some matter existed or fact had taken place to which the defendant alluded; as, if the imputation be that the plaintiff was forsworn, which we have seen^g does not necessarily imply perjury, it should be stated by way of an inducement, that there had been a suit or some judicial proceeding in which the plaintiff was a witness, and that the defendant in speaking the words referred to such matter in using the term "forsworn." But where the words or libel are clearly actionable in themselves, as where the words were "he is a thief" and has robbed me of my bricks," no inducement is necessary.^h

*1379

When the inducement must be proved.

If an inducement be unnecessarily stated it need not be proved,ⁱ but if it be material and connected with the slander it must be proved as stated. Where the declaration stated in the first count, that the plaintiff, a constable, had apprehended persons stealing a dead body, and had carried it to Surgeons' Hall, and that the defendant published the libel of and concerning the plaintiff's said conduct; in the second count, that the defendant published a certain other libel, of and concerning the conduct of the plaintiff respecting the said dead body: held, necessary to prove, in support of both the counts, that the plaintiff had carried the body to Surgeons' Hall.^j So where the allegation was of words spoken of and concerning certain soap, which the defendant had asserted to have been *stolen*, and it appeared that he had only asserted that the soap had been *taken* out of his yard; held, that the variance was fatal.^k

^a Saville v. Sweeney, 4 B. & Ad. 514. (24 Eng. C. L. 108.)

^b Maitland v. Goldney, 2 East, 426. ^c B. N. P. 5.

^d Swithen v. Vincent, 2 Wils. 227. ^e Com. Dig. Action for Defam. G. 9.

^f Strachey's Case, Sty. 118. ^g Ante, 1353.

^h Sloman v. Dutton, 10 Bing. 402. (25 Eng. C. L. 182.) 1 Ch. Pl. 400. 2 Id. 424.

ⁱ Cox v. Thomason, 2 C. & J. 362. Lewis v. Walters, 3 B. & C. 138. (10 Eng. C. L. 36.) May v. Brown, Id. 113. (10 Eng. C. L. 24.)

^j Teesdale v. Clement, 1 Chitty, 603. (18 Eng. C. L. 172.)

^k Shepherd v. Bliss, 2 Stark. 510. (3 Eng. C. L. 453.)

Where the words or libel are actionable only in respect of their affecting the plaintiff in his office, profession, trade, or business, an inducement showing that the plaintiff was in such office, profession, &c., is necessary, and if the plaintiff's character be not admitted in the libel, it must be proved as stated. As where the declaration stated that the plaintiff was treasurer and collector of certain tolls, and that the defendant spoke of and concerning the plaintiff as such treasurer and collector as aforesaid certain words, thereby meaning that the plaintiff, as such treasurer and collector, had been guilty, &c.; it was held, that it was incumbent on the plaintiff to prove that he was both treasurer and collector.* But where the declaration alleged that the plaintiff, at the time of speaking, &c., was of two trades, and that defendant, intending to injure him in his several trades as aforesaid, and to prevent persons from employing him *in the way of his said several trades, in a certain discourse which he had of and concerning the plaintiff in one of his trades, spoke, &c.; held, that though the plaintiff failed to prove he was of both trades, yet he might recover upon proof that he was of that trade concerning which the defendant was charged to have spoken the words.^b

*1380

In the description of the special character in which the plaintiff sues, more than is necessary should not be averred, as the plaintiff will be required to prove his character as described; thus, in an action by a physician for words spoken of him in respect of his profession, it will be sufficient to aver that he used and exercised the profession of a physician; if he avers that he had duly taken the degree of doctor of physic, he will be required to prove his degree as stated.^c By Reg. Gen. H. T. 4 W. IV, the inducement is admitted unless specially denied by the defendant's plea; the plaintiff, therefore, is not bound to prove it under the general issue.^d

Description of special character must be proved.

The inducement is followed by an averment of the defendant's malicious intent; as that the defendant, intending to injure the plaintiff, &c., *fulsely* and *maliciously* did, &c.; it is not necessary, however, to use the word *maliciously*, the words *fulsely* and *wrongfully* have been held to be sufficient.^e So, in an action for slander of title, it is necessary to aver and prove malice.^f

Allegation of malice.

The declaration should then show a publication. Whether the action be for words or for a libel, an averment of publication

Averment of publication.

* *Sellers v. Till*, 4 B. & C. 655. (10 Eng. C. L. 434.) See *Yrisarri v. Clement*, 3 Bing. 432. (13 Eng. C. L. 36.)

^b *Figgins v. Cogswell*, 3 M. & S. 369.

^c *Moises v. Thornton*, 8 T. R. 303. *Smith v. Taylor*, 1 N. R. 196. *Collins v. Carnegie*, 1 Ad. & Ell. 695, (28 Eng. C. L. 180,) see *post*, 1395.

^d *Dukes v. Gostling*, 1 Hodges, 120. 1 Bing. N. C. 589. (27 Eng. C. L. 499.) 3 Dowl. 618. *Chalmers v. Shackle*, 6 C. & P. 475. (25 Eng. C. L. 496.)

^e 1 Saund. 242, a.

^f *Id.* 242, b. *Hargrave v. Le Breton*, 4 Burr. 2423. *Smith v. Spooner*, 3 Taunton, 246.

is essential; no technical words, however, are necessary, to describe it, any allegation which necessarily implies a publication to a third person is sufficient.*

- *1381 Thus, an averment that the defendant spoke the words in the *presence* of divers persons, has been held sufficient, although not *stating that they heard them, for it shall be intended that they heard them.^b(1) But if the words are *Welsh* or a foreign language, it must be averred that the hearers understood such language.* It is not, however, sufficient to aver that the defendant spoke the words, without stating that they had been spoken in the *hearing* or in the *presence* of some one;^d an allegation that the defendant *printed* and *caused* to be *printed* a libel in a newspaper, has been held sufficient after verdict.*

Colloquium.

The declaration must also show the application of the alleged slander to the plaintiff; which is effected by means of a colloquium, or some express averment that the words were spoken or the libel published *of and concerning* the plaintiff; and where an inducement is necessary, it should be shown not only that the imputation related to the plaintiff's character but also that it had reference to the matter stated in the inducement; as that "the words were spoken of and concerning the plaintiff in his said profession."^e "The words *of and concerning* are very material; there may perhaps be words of equivalent import, but I should not advise them, I should rather say that the *via trita* is the safest."^f

- Where actionable words are spoken to the plaintiff, as "You are a thief," &c., it is sufficient to lay a colloquium with him, without an express averment that the words were spoken "of and concerning him."^g But where the words are spoken in the third person, as "He is a thief," though a colloquium of the plaintiff is laid, it is necessary to aver that the words were spoken "of and concerning the plaintiff." It is not sufficient to connect the words with him by means of an innuendo.ⁱ In the latter case, however, the omission of the words "of and concerning" can only be taken advantage of by special demurrer; for it will be intended after general demurrer, or after *1382 *verdict that the words were spoken of the plaintiff, but if there be no colloquium of the plaintiff, the omission of the words "of and concerning" will be fatal to the declaration.^j

* 1 Saund. 242.

^b Hall v. Hennesley, Cro. Eliz. 486. Smart v. Easdale, Cro. Car. 199.

* Fleetwood v. Curley, Hob. 268. Price v. Jenkins, Cro. Eliz. 865.

^d Sty. 70. 1 Stark. Sland. 360. ^e Baldwin v. Elphinston, 2 Bl. 1037.

^f 2 Saund. 242, b. 1 Ch. Pl. 403. 1 Stark. Sland. 384.

^g Per Lord Ellenborough, C. J., in Rex v. Marsden, 4 M. & S. 168.

^h 1 Saund. 242, b. 1 Ch. Pl. 404. 1 Stark. Sland. 384.

ⁱ Id. Com. Dig. Tit. Defam. G. 7. Roll. Abr. 85. Johnson v. Aylmer, Cro. Jac. 126.

^j Skutt v. Hawkins, 2 Roll. 244. 1 Saund. 242, b.

(1) (*Brown v. Brashier*, 2 Penna. 114.)

Where the declaration averred that defendant published of and concerning plaintiff, the following false, &c. matter, without alleging that the *matter was of and concerning* the plaintiff; it then set out the libel, which did not appear on the face of it, to relate to the plaintiff, and there was no innuendo to connect it with him; held, that it was bad even after verdict, and a *venire de novo* was awarded.^a

Where the fact stated in the inducement and connected with the slander by the words "of and concerning," is material to the defamatory character of the slander itself, it must be proved as stated.^b

The libel or slander itself must be set forth in *hæc verba*, The words or libel must be set forth in the declaration. and the declaration must profess so to set it forth; an averment that the words or libel were *to the effect following*,^c or in *substance as follows*,^d would be fatal in arrest of judgment, even though the words themselves be set forth.⁽¹⁾ A declaration stating that the defendant published of a plaintiff a libel *purporting* that the plaintiff's beer was of bad quality,^e or charging the plaintiff with being in insolvent circumstances^f will be bad on general demurrer or in arrest of judgment. So where in a declaration for slander of title, the effect of the words only was set forth; it was held ill, in arrest of judgment, though special damage was the only ground of action. "For," said Lord Abinger, C. B., in delivering the judgment of the court, "if it were sufficient to state merely the effect of words, any person would be at liberty to swear as to the effect of the words, without stating any precise words; and even if the witness did state precise words, the jury would have to judge of their legal effect, whereas that is generally to be decided by the court. It is not expedient to blend questions of law and fact together; it ought therefore to appear to the court on the face of the declaration by the words or signs themselves, that they were sufficient to support such innuendoes or averments as may be necessary to apply to the subject, that they may bear the interpretation put on them, and present the injury which is charged to have resulted from them."^g But where the allegation was "that the defendant imposed the

*1383

^a Clement v. Fisher, (in error,) 7 B. & C. 459. (14 Eng. C. L. 82.) 1 M. & R. 281. And see Rex v. Marsden, 4 M. & S. 164.

^b Tescdale v. Clement, 1 Ch. 603. (18 Eng. C. L. 173.) Shepherd v. Bliss, ante, 1379. Sellers v. Till, 4 B. & C. 656, (10 Eng. C. L. 434,) ante. See Cook v. Ward, 6 Bing. 409. (19 Eng. C. L. 117.)

^c Newton v. Stubbs, 3 Mod. 71. Rex v. Bear, 3 Salk. 417. Gustole v. Mathers, 1 Mees. & W. 495.

^d Flint v. Pike, 4 B. & C. 473. (10 Eng. C. L. 380.) Wright v. Clement, 3 B. & A. 503. (5 Eng. C. L. 358.)

^e Wood v. Brown, 6 Taunt. 169. (1 Eng. C. L. 347.)

^f Cook v. Cox, 3 M. & S. 110.

^g Gustole v. Mathers, 1 Mees. & Wels. 495. 2 Gale, 64.

(1) (Cooper v. Bruce, 2 Watts, 109. Tipton v. Kahle, 3 Watts, 93. Brown v. Brashier, 2 Penna. 114. Foster v. Small, 3 Wharton, 138.)

crime of felony upon the plaintiff;" it was held sufficient after verdict.^a

If the libel be in a foreign language, a translation should be annexed. It is sufficient to set forth the substance of the charge.

If the words be spoken, or the libel published in a foreign language, they must be set out in the original language, or the declaration will be bad in arrest of judgment;^b and it seems that a translation should also be set out in the declaration.^c (1) It is sufficient to set forth so much of the publication as comprises the substance of the charge made by the defendant against the plaintiff; as where a libel charged the plaintiff with being the most artful scoundrel that ever existed, and with being insolvent, but the writer added, that he had never disclosed the matter, nor ever would, except to the person whom he addressed as his friend; it was held, that the omission of the latter assertion was immaterial.^d If the part set out be distinct and intelligible, and constitute a libel of itself, it is unnecessary to set out another part of the publication to which the libellous passage refers.^e A material variance between

Variance.

*1384

the libel declared upon and that proved, will be fatal; as where separate passages of a libel are set out in the declaration, they should be described as forming distinct parts.^f Where the libel declared upon alleged that the defendant had composed, written, and published the libellous matter, and it appeared from the libel itself that he had given references to another work, from which the matter was taken, but which was omitted in the declaration; held, that the variance was fatal, inasmuch as the sense of the libel declared upon was different from that produced in evidence, as the omissions altered the sense of the remainder.^g Where the declaration in stating the libel, which imputed to the plaintiff, "that he had formerly a house in *O.*, and some time prior to that he had one in *M.*, in both of which he continued," omitted the words "*of which*;" it was held a fatal variance.^h

Words should be set forth precisely as they are spoken

Slandorous words should be stated as they are uttered. Proof of words spoken in the third person will not support a count for words spoken in the second, and *vice versa*.ⁱ And if words be spoken interrogatively, they must be so laid; it will be fatal to aver that they were spoken affirmatively.^j When the words were spoken in answer to a question, and the

^a *Blizard v. Kelly*, 2 B. & C. 283. (9 Eng. C. L. 87.)

^b *Zenobio v. Axtell*, 6 T. R. 162.

^c *Rex v. Goldstein*, 3 B. & B. 201. (7 Eng. C. L. 411.) 7 Moore, 1.

^d *Rutherford v. Evans*, 6 Bing. 451. (19 Eng. C. L. 128.) 4 M. & P. 163. *Rex v. Bunton*, 8 Mod. 329.

^e *Buckingham v. Murray*, 2 C. & P. 46. (12 Eng. C. L. 21.)

^f *Tabart v. Tipper*, 1 Camp. 352.

^g *Cartwright v. Wright*, 1 D. & R. 230. 5 B. & A. 615. (7 Eng. C. L. 210.)

^h *Cooke v. Smith, M'Clel. & Y.* 250.

ⁱ B. N. P. 5. *Rex v. Berry*, 4 T. R. 217. *Stannard v. Harper*, 5 M. & R. 295.

^j *Barnes v. Halloway*, 8 T. R. 150.

slander is to be collected not merely from the answer, but from the answer and question together, the words must be laid according to the fact.^a Where the words alleged in the declaration were, "This is my umbrella; he stole it from my back door;" and the words proved were, "It is my umbrella," &c.; and it appeared that these words were not spoken in the house where the umbrella then was; held, a fatal variance, for the words laid imported to be spoken concerning a thing then *present*, and the words given in evidence were spoken concerning a thing not present at the time.^b So the words alleged in the declaration were, "The plaintiff's wife is a great thief, and ought to have been transported seven years ago;" the words proved were, "She is a bad one, and ought to have been transported seven years ago;" held a fatal variance, for the words proved were not actionable without a colloquium of felony.^c But where the words charged were, "You stole one of my sheep," and those proved were, "You stole my sheep *and killed it;" held, no variance, because the word "it," *1385 showed that only one was meant.^d

The addition or omission of a word will be immaterial unless it alter the sense.^e It will be sufficient for the plaintiff to prove so much of the words laid as will by themselves support the action;(1) as where the words were "He is a maintainer of thieves and a strong thief," and the jury found the whole to have been spoken except the word *strong*; held sufficient.^f But if all the words as laid constitute but one charge, the whole must be proved.^g Where the libel declared upon imputed to the plaintiff "mismanagement or ignorance," and the words proved were, "ignorance or inattention;" held a fatal variance.^h

An innuendo is a form of words introduced to explain some matter already expressed. "An innuendo," said De Gray, C. J., "means nothing more than the words *id est scilicet*, or 'meaning,' or aforesaid, as explanatory of a matter sufficiently expressed before; as such a one, (*meaning the defendant*), or such a subject (*meaning the subject in question*.) But as an innuendo is only used as a word of explanation, it cannot extend the sense of expressions beyond their own meaning, unless something is put upon the record for it to explain. As in an action for saying 'He has burnt my barn,' the plaintiff cannot, by way of *innuendo*, say (*meaning 'his barn full of corn;*') Barham's case, 4 Rep. 20; because that is not an explanation of what was said before, but an *addition* to it. But if in the

^a See Bromage v. Prosser, 4 B. & C. 247. (10 Eng. C. L. 391.)

^b Walters v. Mace, 2 B. & A. 756.

^c Hancock v. Winter, 2 Marsh. 502. 7 Taunt. 205. (2 Eng. C. L. 71.)

^d Robison v. Wallis, 2 Stark. 194. (3 Eng. C. L. 310.)

^e B. N. P. 5.

^f Burgis's case, Dyer, 75.

^g Flowers v. Pedley, 2 Esp. 491.

^h Brooks v. Blanchard, 1 C. & M. 779.

(1) (*Purple v. Horton*, 13 Wend. 9. *Whiting v. Smith*, 13 Pick. 364.)

introduction it had been averred, that the defendant had a barn *full of corn*, and that in a discourse about that barn, the defendant had spoken the words of the plaintiff, an innuendo of its being the barn full of corn would be good, for by coupling the innuendo with the introductory averment, 'his barn full of corn,' it would have made it complete."^a So in an action for saying that the plaintiff was forsworn, an innuendo (meaning that the plaintiff had committed perjury) is improper, without

*1386

An innuendo must not introduce new facts.

*a colloquium that that the words related to false swearing in a judicial proceeding, for the word "forsworn," unless in reference to a judicial proceeding, does not of itself constitute perjury.^b

Where the declaration laid the words as follows:—"You have robbed me of one shilling tan money," and the innuendo explained the meaning to be, that the plaintiff had fraudulently taken and applied to his own use one shilling received by him for the defendant, being the produce of the sale of some tan sold by the plaintiff for and as servant to the defendant, but there being no introductory averment of a colloquium relating to these circumstances; it was held, that the innuendo was bad, as introducing new facts, and that, without the innuendo, the count did not charge words actionable in themselves.^c

Or enlarge the sense of the words.

So where the declaration stated, that the plaintiff was about to prove a debt justly due, under a commission of bankruptcy; and that the defendant spoke these words of him—"You" (meaning the said plaintiff) "are a regular prover under bankruptcies," innuendo (meaning that the plaintiff was accustomed to prove fictitious debts under a commission of bankruptcy;) held that the innuendo imputing a crime punishable by law, was bad, as it enlarged the natural meaning of the words used, without resting on any introductory averment of a colloquium respecting the proof of fictitious debts.^d

Where the declaration stated that divers persons had been associated together under the name of "The Society of Guardians for the protection of trade against swindlers and sharpers," that the defendant was accustomed to publish reports for the purpose of denoting to the said society the names of such persons as were deemed swindlers and sharpers, and improper persons to be proposed to be balloted for as members of the society; and then set out the libel as follows:—"Society of guardians for the protection of trade against swindlers and sharpers, &c. I (meaning defendant) am directed *to inform you, that *A. B.* (plaintiff) is reported to the society as improper to be proposed to be balloted for as a member thereof,"

*1387

^a Per De Grey, C. J., in *Rex v. Horne*, Cowp. 684.

^b *Hawkes v. Hawkey*, 8 East, 427. *Holt v. Scholefield*, 6 T. R. 691. *Hall v. Blandy*, 1 Y. & J. 490.

^c *Day v. Robinson*, (in error,) 4 Nev. & M. 864. 1 Adol. & Ellis, 554. (28 Eng. C. L. 151.)

^d *Alexander v. Angle*, 1 C. & J. 143. 7 Bing. 119. (20 Eng. C. L. 71.)

thereby meaning that the plaintiff was a swindler and sharper, and an improper person to be a member of the said society; held, in arrest of judgment, that the innuendo could not be supported without a previous averment that it was the custom of the society to designate swindlers and sharpers by the terms "improper persons to be members" of that society, and that it did not appear that the society described in the libel was the society described in the introductory part of the declaration, and that the defect was not cured by verdict.^a

It may be collected from the preceding decisions that the office of an innuendo is merely to explain the meaning of some matter previously stated in the declaration; that it cannot enlarge the sense of the words beyond their natural meaning, unless by reference to a prefatory averment; that it cannot supply the omission of a proper colloquium or introduce new matter, or convey any other meaning than that which may fairly be collected from the words themselves or from the words in connection with an introductory averment.⁽¹⁾

Where the declaration stated that the defendant wrote concerning plaintiff, "He is so inflated with 300*l.* made in my service, God only knows whether honestly or otherwise, that," &c.; held, without any preliminary averment, to warrant an innuendo that plaintiff had conducted himself in a dishonest manner in the defendant's service.^b And where the declaration stated that the defendant, in whose service the plaintiff had formerly been as a gardener, wrote to his master; "I have reason to suppose that many of the flowers of which I have been robbed are now growing in your garden." Innuendo, "meaning that the plaintiff had been guilty of larceny, and had stolen certain plants, roots, and flowers;" held, that after verdict, it might be intended that the plaintiff had taken flowers before, and so the libel charged a second offence, which would be larceny; or that the flowers were not growing in the soil at the time of the taking; and that the innuendo was not too large.^c

In an action for words imputing to the plaintiff that he had set fire to his own premises; innuendo, (meaning that he had

^a Goldstein v. Foss, (in error,) 2 Y. & J., 146. 4 Bing. 489. (15 Eng. C. L. 53.) 6 B. & C. 154. (13 Eng. C. L. 128.)

^b (Jlegg v. Laffer, 3 M. & Scott, 727. 10 Bing. 250. (25 Eng. C. L. 120.)

^c Gardiner v. Williams, 2 C. M. & R. 78. 1 Gale, 69, (in error.) 1 Mees. & Wels. 245.

(1) (Where the words do not of themselves necessarily impute a crime they must in general be coupled, by means of a colloquium, with facts, which give a particular hue to the meaning, and which, by the help of innuendoes to designate the things and persons alluded to, disclose a charge of guilt resulting from the whole, in a way to be intelligible to a bearer of ordinary capacity. *Thompson v. Lusk*, 2 Watts, 17. But where the words, considered in connection with facts and circumstances alleged by the words themselves to be known by the bearers and understood by them, impute the existence of guilt, which can arise only from a specific offence, the charge supposed to result from them, may be laid by an innuendo, without recourse to a colloquium. *M'Kenna v. Greer*, 2 Watts, 353. See farther *Beirer v. Bushfield*, 1 Watts, 23.)

been guilty of wilfully setting fire to the premises, which while in his occupation had been destroyed by fire;) after verdict for the plaintiff, judgment was arrested, because the words might have been used in the sense charged in the innuendo without imputing to the plaintiff an indictable offence; wilfully setting fire to a person's own premises is not necessarily a crime, the imputation therefore was not actionable.^a

If an innuendo be superfluous it may be rejected.

If an innuendo be absurd or superfluous, and a sufficient cause of action appears without it, it may be rejected as surplusage.^b Care should be taken not to introduce an innuendo giving to the slander a particular character, which is not necessary to support the action; for in general innuendoes must be proved as laid; thus, where the words declared upon imputed either a fraud or a felony, and the declaration contained an innuendo that the defendant meant thereby to impute a felony; it was held to be incumbent on the plaintiff to prove that they were spoken in the latter sense.^c

Damage.

When the words are actionable in themselves, it is unnecessary to lay special damage in the declaration. But where special damage is the gist of the action, it must be stated with particularity; as, if the injury consist of the loss of customers, the names of the customers should be specified.^d

*1389

*SECTION XI.

THE PLEADINGS.

THIS being an action on the case, the general issue is "not guilty," which by Reg. Gen. H. T. 4 W. IV, "shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant;" and "in an action of slander of the plaintiff, in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously and in the sense imputed, and with reference to the plaintiff's office or trade."^e

Evidence under the general issue.

The only effect of the new rules, in respect of the pleading in this action, appears to be, that the matter stated in the inducement, unless specially denied, will be considered as admit-

^a Sweetapple v. Jesse, 5 B. & Ad. 27. (27 Eng. C. L. 24.) 2 N. & M. 36.

^b Roberts v. Camden, 9 East, 93. Harvey v. French, (in error,) 1 C. & M. 11. 2 Moor & S. 591. Per Tindal, C. J., in Day v. Robinson, *supra*. Per Parke, B., in Gardiner v. Williams, *supra*.

^c Smith v. Carey, 3 Camp. 461. Williams v. Stott, 1 C. & M. 675. Sellers v. Till, 4 B. & C. 655. (10 Eng. C. L. 434.)

^d B. N. P. 7. 1 Sid. 396. Lowe v. Harewood, Sir W. Jones, 196.

^e Reg. Gen. H. T. 4 W. IV, r. 4.

ted under the general issue;^a and that a release and accord and satisfaction, which formerly might have been given in evidence under this plea,^b must now be specially pleaded.^c With these exceptions the plea of not guilty puts in issue the same facts, and the same evidence is admissible under it, as formerly. The plaintiff, therefore, must under this plea, prove all the facts alleged in his declaration which are essential to his right to recover, and the defendant may give evidence to disprove any thing essential to the plaintiff's case; he may show that the alleged slander or libel was not spoken or published in the malicious sense imputed by the declaration, but in an innocent sense, or that it was spoken or published on an occasion which rebutted the inference of malice; as that it was a privileged communication, &c.;^d that the alleged libel was published by order of the House of Commons.^e It seems, indeed, that with ^{*1390} the exceptions above stated, the defendant may under the general issue, give any matter in evidence which is in law an answer to the action, except the *truth* of the imputation, which *must* be specially pleaded.

The plea of justification, on the ground of the truth of the slander or libel, must in general confess the imputation as laid in the declaration, otherwise it will be bad on demurrer;^f and it should be framed with the same degree of certainty and precision as are requisite in an indictment or information.^g If the imputation against the plaintiff be general, the plea of justification must state specific facts, showing particular instances of misconduct on the part of the plaintiff, of the same nature as the slander laid in the declaration; a plea in the words of the libel will be bad on demurrer; thus, a justification of a charge of a person being a swindler, must state the particular instances by which the defendant means to support it.^h Where a libel charged an attorney with general misconduct, viz., gross negligence, falsehood, prevarication, and excessive bills of costs, in the business he had conducted for the defendant; a plea in justification, repeating the same general charges, without specifying the particular acts of misconduct, was held insufficient upon demurrer.ⁱ A plea of justification to an action for

Justifica-
tion of
truth.

^a See *ante*, 1380.

^b *Lane v. Applegate*, 1 Stark. 97. (2 Eng. C. L. 312.)

^c Reg. Gen. H. T. 4 W. IV.

^d *Lillie v. Price*, 1 N. & P. 16. 5 Dowl. 432. *Smith v. Richardson, Willes*, 20. As to what constitutes a privileged communication, &c., see *ante*, 1363, *et seq.*

^e *Stockdale v. Hansard*, Coram Littledale, J., at Chambers, Nov. 1836. In this case there was a plea of not guilty, and also a special plea of justification to the above effect, and the learned judge ordered the special plea to be struck out; as that defence might be given in evidence under the general issue. See Reg. Gen. H. T. 4 W. IV.

^f *Johns v. Gittens*, Cro. Eliz. 239. Per Bayley, J., in *M'Pherson v. Daniels*, 10 B. & C. 266. (21 Eng. C. L. 69.)

^g 1 Stark. Sland. 476. *Wyld v. Cookman*, Cro. Eliz. 492.

^h *J'Anson v. Stewart*, 1 T. R. 748.

ⁱ *Holmes v. Catesby*, 1 Taunt. 543. *Jones v. Stevens*, 11 Price, 235. *Lane v. Howman*, 1 Price, 76.

charging the plaintiff, as a justice of the peace, "with pocketing fines of prisoners whom he had convicted," should state the names of the parties convicted, and of whom the plaintiff had received the fines.^a

Justification of part.

It is no objection to the plea that it does not justify the whole charge; if the charge be divisible, a justification of part will be good *pro tanto*. As where the imputation was, that the plaintiff (a proctor) "had been suspended three times, *per quod* his neighbors were led to think he had been guilty of extortion;" plea, that he had been suspended once for extortion; *held, that the libellous matter was divisible, and that the plea was an answer to a part.^b

*1391

A substantial justification is sufficient.

If the imputation be substantially justified, it is sufficient.^c A plea, stating that the libellous matter complained of, "is true in substance and effect," means, that it is true in every material particular, and if the defendant does not prove such statement to be true, the plea is not proved, although he prove facts of the same description.^d But if the declaration alleges a charge of felony, a plea confessing the charge and justifying only by stating circumstances of suspicion, is not sufficient.^e Where in an action for libelling the plaintiffs in their business of selling medicines, by publishing that the defendants "had crushed the Hygeist system of wholesale poisoning pursued by the *scamps* and *rascals*, and that several of the rotgut *rascals* had been convicted of manslaughter; and fined and imprisoned for killing people with enormous doses of their universal boluses;" the defendants justified "that the pills were composed of aloes and gamboge of a dangerous poisonous nature, and that two of the Hygeists had been convicted of manslaughter for administering the pills;" held, after verdict, that the plea was sufficient, though it did not justify the words *scamps* and *rascals*, and though it appeared that one of the patients who had died had not taken the quantity of pills which the Hygeist had ordered, it appearing that a greater number would only have accelerated his death. The court considered that the substantial imputation contained in the libel was justified by the plea, and that it was not necessary to justify terms of general abuse.^f

If the defendant intends to avail himself of the statute of limitations, he must plead it specially.^g

Defences admissible under the general issue.

There are many matters of defence which, though admissible in evidence under the general issue, may also be specially pleaded. Whenever the occasion of the speaking or publishing

^a Newman v. Bailey, 2 Chitty, 665. (18 Eng. C. L. 449.)

^b Clarkson v. Lawson, 6 Bing. 587. (19 Eng. C. L. 169.) But such plea to the whole declaration would be ill on demurrer. *Id.* 266. (19 Eng. C. L. 78.) See Mountney v. Watton, 2 B. & Ad. 678, (22 Eng. C. L. 164,) *infra*.

^c Edwards v. Bell, 1 Bing. 403. (8 Eng. C. L. 360.) 1 Stark. Sl. 403.

^d Weaver v. Lloyd, 4 D. & R. 230. 2 B. & C. 678. (9 Eng. C. L. 217.)

^e Mountney v. Watton, 2 B. & Ad. 673. (22 Eng. C. L. 164.)

^f Morrison v. Harmer, 3 Bing. N. C. 759. (32 Eng. C. L.) 3 Hodges, 112.

^g See *ante*, 1344.

*furnishes a defence to the action, it seems it *may* be specially pleaded. As if the defence be that the alleged libel was a report of proceedings in a court of justice; the defendant may plead that fact specially. It has indeed, been doubted whether such defence may be available under the general issue.^a But, as a privileged communication may be given in evidence under a plea of not guilty,^b there appears no solid reason why this defence should not also be admissible under that plea; it is usual however, and the safer course to plead it specially. The plea, to be available, must state that the publication is a true, accurate, and full report of proceedings in a court of justice.^c A plea that it is in *substance* a true report, is bad.^d

A plea of justification on the ground that the imputation was a privileged communication, must expressly deny malice, or state that the communication was made honestly and *bonâ fide*, which might imply the absence of malice;^e and if the publication be actionable of itself, a plea merely denying that the plaintiff has sustained any special damage is bad, though special damage be alleged in the declaration.^f It is no answer to an action for oral slander, that the defendant heard the words from another, and that he named him at the time; he must also allege that he believed the words to be true, and that he spoke them on a justifiable occasion.^g

The plaintiff cannot object at the trial, that the plea of justification is insufficient, as he should have demurred. The defendant is, therefore, entitled to verdict if the plea be proved.^h Where there is a plea of not guilty and justifications, and the jury find for the defendant on the former, they should be discharged from finding on the special pleas.ⁱ

^a Curry v. Walter, 1 B. & P.

^b See *ante*, 1389.

^c Per Tindal, C. J., in Delegal v. Highley, 3 Bing. N. C. 963. (32 Eng. C. L.) Saunders v. Mills, 6 Bing. 213. (19 Eng. C. L. 60.)

^d Flint v. Pike, 4 B. & C. 473. (10 Eng. C. L. 380.) See *ante*, 1373, as to what reports of judicial proceedings are justifiable.

^e Smith v. Thomas, 2 Bing. N. C. 372. (29 Eng. C. L. 362.) 1 Hodges, 353.

^f *Id.*

^g M'Pherson v. Daniels, 10 B. & C. 263, (21 Eng. C. L. 69,) *ante*, 1376.

^h Edmonds v. Walter, 3 Stark. 7. (14 Eng. C. L. 145.) 2 Chitty, 291. (18 Eng. C. L. 339.)

ⁱ Robertson v. M'Dougall, 4 Bing. 670. (15 Eng. C. L. 106.)

*SECTION XII.

EVIDENCE.

	PAGE	PAGE
1. Evidence for the plaintiff.		2. Evidence for the defendant 1398

1.—*Evidence for the plaintiff.*] If the publication of the slander be not admitted by the pleadings, the plaintiff must give evidence of it. If the action be for words, proof of their having been spoken in the presence of a third person is sufficient.^a (1) The words, we have seen, must in general be proved as laid.^b If the action be for written slander, proof of the libel produced being in the handwriting of the defendant is *prima facie* evidence of it being published by him.^c If the words have been spoken or the libel addressed to the plaintiff only, without any further publication, the action cannot be sustained, though such publication might be the subject of an indictment, on the ground of its tendency to produce a breach of the peace.^d

Proof of
publica-
tion.

In an action for a libel contained in a letter, written by the defendant to the plaintiff; proof, that the defendant knew that letters sent to the plaintiff were usually opened by his clerk, is evidence to go to a jury of the defendant's intention that the letter should be read by a third person which would amount to a publication.^e But sending a letter to a third person is proof of publication. Where a letter containing the libel, in the handwriting of the defendant was addressed to a party in Scotland, and was proved to have been put into the post office, and to have been forwarded to Scotland, and to have the proper post marks on it, and was produced with the seal broken; it was held sufficient evidence of it having reached the party to whom it was addressed, and consequently of a publication.^f A publication by an agent is a publication by the principal; thus, the sale of a libel in the defendant's shop by his servant, is *prima facie* evidence of a *publication by the defendant.^g The defendant, may, however, rebut the presumption, by showing that the libel was sold contrary to his orders, or without his authority.^h

*1394

In order to show that a defendant had caused a printed libel

^a B. N. P. 5.

^b See *ante*, 1383.

^c Rex v. Beare, 1 Lord Raym. 417.

^d 1 Saund. 132. Phillips v. Jansen, 2 Esp. 624. 2 Stark. Ev. 452.

^e Delacroix v. Trevenot, 2 Stark. 63. (3 Eng. C. L. 245.)

^f Warren v. Warren, 1 C. M. & R. 250.

^g Bac. Ab. Libel, 458. Com. Dig. Libel. Plunkett v. Cobbett, 5 Esp. 136.

^h 2 Stark. Ev. 455.

(1) (A witness unable to say whether the words were spoken before or after the commencement of the suit is inadmissible. *Scovill v. Kingale*, 7 Conn. 284.)

to be inserted in a newspaper, a reporter proved that he had given a written statement to the editor of the newspaper, the contents of which had been communicated by the defendant for the purpose of such publication, and that the newspaper then produced was exactly the same with the exception of one or two slight alterations, not affecting the sense; held, that what the reporter published in consequence of what passed with the defendant, might be considered as published by the defendant, but that the newspaper could not be read in evidence without producing the written account delivered by the witness to the editor.^a

So, where in an action for a libel published in a newspaper, a letter was produced in the defendant's handwriting to prove it to have been sent by the defendant to the newspaper office; and therefore some of the most libellous passages in the letter were struck out by the editor; but the libel which was published corresponded with those parts of the manuscript which were not struck out; held to be sufficient evidence of a publication by the defendant, for though he did not authorise the erasures, yet as he gave permission to the printer to publish the libel in a larger and more offensive form, he authorised him to publish it in a form which was less offensive.^b

Printing a libel is *prima facie* evidence of a publication.^c The delivery of a newspaper to the officer at the stamp office,^d or accounting to the officer for the duties on advertisements contained in the paper, is sufficient evidence of publication.^e If a libel be dated of a particular place, it is *prima facie* evidence that it was written there.^f Where a libel was composed written "and put into the post office (whether sealed or not was doubtful) in *L.*, with an intention that it should be published, and was afterwards published in *M.*, held, sufficient to warrant the jury to infer a publication in *L.*^g(1) The production of a

^a Adams v. Kelly, R. & M. 157. (21 Eng. C. L. 403.)

^b Tarpley v. Blabey, 2 Bing. N. C. 437. (29 Eng. C. L. 387.) 1 Hodges, 414. Waddington v. Cousins, 7 C. & P. 395. (32 Eng. C. L.) Bond v. Douglass, 7 C. & P. 626.

^c Baldwin v. Elphinstone, 2 Bl. 1038.

^d Rex v. Amphlett, 4 B. & C. 35. (10 Eng. C. L. 275.)

^e Cook v. Ward, 6 Bing. 409. (19 Eng. C. L. 117.) And see Rex v. Topham, 4 T. R. 126.

^f Rex v. Burdett, 4 B. & Ad. 95. (6 Eng. C. L. 358.)

^g *Id.*

(1) It is well settled, that a sending of a letter to the party, filled with abusive language, is an indictable offence, because it tends to a breach of the peace. It has indeed been a matter of doubt whether the sending of such a letter to another would support an action for libel, because there is no publication. But the sending of such a letter, without other publication, is clearly an offence of a public nature and punishable as such, as it tends to create ill blood, and cause a disturbance of the public peace. *The State v. Avery*, 7 Conn. 269. *Waistel v. Holman*, 2 Hall, 172.

In an action on the case for a libel contained in an anonymous letter, sent through the post office, to a person out of the jurisdiction of the court, proof that the letter was deposited in the post office, and duly despatched, and the production of the letter by the plaintiff, are sufficient proof of the publication without the oath of the person to whom it was addressed. *Callan v. Gaylard*, 3 Watts, 321.)

Newspapers.

certified copy of the affidavit filed at the stamp office by the printers, publishers and proprietors of newspapers, pursuant to 38 Geo. III, c. 78, ss. 9—11, together with a paper corresponding with the paper described in the affidavit is sufficient evidence of a publication by the parties making the affidavit.^a

Declaration to be made by the printers, publishers and proprietors of a newspaper.

By 6 & 7 W. IV, c. 76, s. 6, no person shall print or publish a newspaper, before there shall be delivered at the stamp office a declaration in writing, containing the title of the newspaper, a description of the building where it is intended to be published, the name and place of abode of the printer and publisher, and of every proprietor resident out of the United Kingdom, and of every proprietor resident in the United Kingdom, if not exceeding two, exclusive of printer and publisher; and if the number does exceed two, then of such two persons being proprietors, the amount of whose respective proportional shares shall not be less than the proportional shares of any other proprietor; and every such declaration shall be signed by every person named therein as printer or publisher, and by every proprietor named therein who shall be resident within the United Kingdom. Sec 7, imposes a penalty of 50*l.* for printing or publishing a newspaper without having made and delivered such declaration. And by sec 8, the commissioners of the stamp office are required to deliver, on payment of one shilling a certified copy of such declaration to any person applying for the same; and such copy shall be admitted in all proceedings, whether civil or criminal, touching any publication contained in such newspaper, as conclusive evidence of the truth of every matter contained in the declaration; and after production of such copy, and a newspaper entitled as therein mentioned it shall not be necessary to prove the purchase of the paper.^b

A copy of such declaration to be evidence.

Inducement.

If the inducement be material and specially denied, the plaintiff must prove the facts therein alleged; if not denied, it will be considered as admitted.^b

Proof when the slander is in respect of office, profession, &c.

If the slander affect the plaintiff in his office, profession, or business, it will be necessary for him to prove that he filled the office, or was a member of the profession, &c., unless the slander or libel admits that the plaintiff filled that character, in which case proof thereof will be dispensed with.^c In order to sustain an allegation that the plaintiff filled a certain situation, it is in general sufficient to show that he acted in that capacity.^d

It is said in 2 Starkie on Slander, that where a plaintiff avers generally that he filled any particular situation or office in

^a *Mayne v. Fletcher*, 9 B. & C. 382. (17 Eng. C. L. 401.) *Rex v. Hunt*, 31. Howel's State Trials, 373. 9 B. & C. 385, n.

^b See *ante*, 1380.

^c *Jones v. Stevens*, 11 Price, 235. *Bognall v. Underwood*, *id.* 621. *Yrisarti v. Clement*, 3 Bing. 432. (13 Eng. C. L. 36.)

^d *Berryman v. Wise*, 4 T. R. 366.

which he has been calumniated, or that he exercised any particular profession or business, it is sufficient to give general evidence of his having acted in the office or situation, or of his having exercised that particular profession, or carried on that trade or business; but in a recent case, Lord Denman said, "No doubt a person complaining of a slander upon him in a particular character, must prove that he possesses that character where the slander does not admit it."^a Therefore where the declaration alleged that plaintiff had been and was a physician, and exercised that profession in England, and on that account had been and was called doctor, meaning doctor of medicine, "and then stated that defendant slandered the plaintiff in his character of a physician practising in England, and denied his right to be called a doctor of medicine; held, that the plaintiff was bound to prove that he was entitled to practise as a physician in England; and that such proof was not furnished by showing the fact of his having so practised; nor by showing that he had received the degree of doctor of medicine at the university of St. Andrew's.^b To prove that the plaintiff has taken the degree of doctor of physic he must produce the books of the university containing the act which conferred the degree, or an examined copy of such act, or a diploma with proof of the seal of the court."^c

*1396

Doctor of
physic.

Attorney.

To prove that the plaintiff is an attorney, an examined copy of the roll of attorneys signed by the plaintiff is sufficient.^d So is the book in the master's office containing the names of all the attorneys, together with proof that the plaintiff practised as an attorney at the time.^e So the stamp office certificate, countersigned by the master of the court, is *prima facie* evidence that the plaintiff is an attorney of that court.^f

If the slander or libel is actionable in itself, that is, if its natural tendency is to vilify, defame and injure the plaintiff, and no circumstance appears which in law could justify the defendant in publishing it, the law infers malice from the very act, and no extrinsic evidence thereof is necessary.^g(1) But if it appears that the words were spoken, or the libel published on a justifiable occasion; as, if it be a privileged communication,

Malice.

^a Collins v. Carnegie, 1 Ad. & Ell. 703. (28 Eng. C. L. 180.)

^b *Id.* As to proof of having taken a degree of M.D. at St. Andrew's, see *id.* See Smith v. Taylor, 1 N. R. 196.

^c Moises v. Thornton, 8 T. R. 303.

^d Roscoe, Ev. 371.

^e Lewis v. Walter, 3 B. & C. 138. (10 Eng. C. L. 36.) Jones v. Stevens, 11 Price, 251.

^f Sparkling v. Heddon, 9 Bing. 11. (23 Eng. C. L. 245.)

^g Bromage v. Prosser, 4 B. & C. 247. (10 Eng. C. L. 321.) Per Le Blanc, J., in Rex v. Creevy, 1 M. & S. 273.

(1) (Words, when used in a manner and sense to impute guilt, imply, in contemplation of law, malice sufficient to sustain an action, and entitle the plaintiff to a verdict; but the amount of damages depends in part on the degree of malice, of the malignity and wantonness of intention to injure, with which the words used were spoken. *Rigden v. Wolcott*, 6 Gill & Johns. 413.)

it will be incumbent on the plaintiff to give evidence of malice in fact.^a In order to prove malice the plaintiff may give evidence any expressions of the defendant, whether oral or written not actionable in themselves, which indicate spite or ill will; but the usual course of law is not to receive in evidence, to show the *quo animo*, anything which may be the subject of another action unless it distinctly relates to the same subject as the slander for which the action is brought. "The distinction is this, you may give evidence of subsequent words to explain the words in the declaration, but where there is nothing equivocal in the words charged, you cannot give evidence of subsequent words of the same import; for which an action may be brought and damages received;" for the record in this action would not be evidence in a subsequent action, and the damages might be enhanced by the admission of such evidence, yet the plaintiff might recover distinct damages for such words in a subsequent action."^b But previous slander, for which damages have been received, is admissible in evidence.^c So, a writ of inquiry issued against the defendant in a former suit for speaking similar slanderous words, is admissible.^d In an action for words imputing perjury, the plaintiff was allowed to show that subsequently to the words the defendant preferred an indictment against him.^e But the plaintiff must, under the general issue, show that the slander or libel is false.^f

In an action for a libel in a weekly periodical publication, a witness was allowed to prove a purchase of a copy after the action brought as well as before, for although not evidence for the purpose of aggravation, it was evidence to show that the paper was deliberately circulated.^g

Where words were given in evidence by the plaintiff, in order to prove a malicious intent by the defendant, which were not stated in the declaration; held, that the defendant might

*1398 prove the truth of such words.^h Where special damage is

^a *Id.* See *ante*, 1363.

^b Per Tindal, C. J., in *Defries v. Davis*, 7 C. & P. 112, (32 Eng. C. L.) in which case evidence of a subsequent repetition of the same slander was admitted. *Finnerty v. Tipper*, 2 Camp. 72. In this case, Sir James Mansfield, C. J., said, "You might as well give in evidence one highway robbery on the trial of another." *Waddington v. Cousins*, 7 C. & P. 595. (32 Eng. C. L.) *Tarpley v. Blabey*, *ante*, 1394.

^c Per Lord Abinger, C. B., in *Pearce v. Ormsby*, 1 M. & Rob. 456. *Simmons v. Blake*, *id.* 477. *Stuart v. Lovell*, 2 Stark. 93. (3 Eng. C. L. 261.) But see *Rustell v. Maquister*, 1 Camp. 49, n. *Lee v. Huson*, Peake, 166. *Macleod v. Wakeley*, 3 C. & P. 312, (14 Eng. C. L. 392,) where actionable words and libels not mentioned in the declaration were received in evidence.

^d Per Patteson, J., 1 M. & Rob. 478.

^e *Jackson v. Adama*, 1 Hodges, 78.

^f *Tate v. Humphreys*, 2 Camp. 73.

^g *Stuart v. Lovell*, 2 Stark. 93. (3 Eng. C. L. 261.)

^h *Plunkett v. Cobbett*, 5 Esp. 136. See *Chubb v. Westley*, 6 C. & P. 436. (25 Eng. C. L. 474.)

ⁱ *Warne v. Chadwell*, 2 Stark. 457. (3 Eng. C. L. 430.)

the gist of the action the plaintiff must prove it as alleged in the declaration.^a

2.—*Evidence for the defendant.*] It has already been shown what evidence the defendant may give under the general issue in bar of the action; it is here proposed to show what evidence he may produce in mitigation of damages. It has been held that the defendant may, in mitigation of damages, show that he copied the libel from another newspaper, and omitted some passages reflecting on the plaintiff.^b So, he may give in evidence libels previously published of him by the plaintiff, with a view of showing a provocation,^c provided they relate precisely to the same subject as the libel for which the action is brought; but not otherwise.^d(1) But general evidence that the plaintiff has been in the habit of libelling the defendant, is not admissible.^e Where the libel purported to be a report of what took place at a coroner's inquest, evidence of what occurred at the inquest was received in mitigation of damages.^f It has been held in several cases that the defendant may give general evidence of the plaintiff's bad character.^g But in a recent case it was held that general evidence of the bad character of the plaintiff, (an attorney,) and of his ill repute in the profession, was inadmissible either to contradict an allegation in the declaration "that he carried on the business of an attorney with great credit;" or in support of an averment in the defendant's justification, "that the defendant was a disreputable professor and practitioner in the law."^h If the defendant in an action for slander, gave up the name of the person from whom he heard it at the time, *he may give evidence in mitigation of damages, that he heard the slander from that person.ⁱ(2)

Evidence
in mitiga-
tion of da-
mages.

*1399

In an action for a libel, the defendant cannot, in mitigation of damages, put in newspapers deposited at the stamp-office pursuant to the statute 38 G. III, c. 78, containing libels on

^a See *ante*, 1357.

^b *Crevey v. Carr*, 7 C. & P. 64. (39 Eng. C. L.) See *Saunders v. Mills*, 6 Bing. 213. (19 Eng. C. L. 60.)

^c *Watts v. Fraser*, 7 C. & P. 369. (39 Eng. C. L.)

^d *May v. Brown*, 3 B. & C. 113. (10 Eng. C. L. 24.) *Tarpley v. Blabey*, 2 Bing. N. C. 437. (29 Eng. C. L. 387.) *Ante*, 1394.

^e *Wakeley v. Johnson*, R. & M. 422. (21 Eng. C. L. 480.)

^f *East v. Chapman*, M. & M. 46. 2 C. & P. 571. (12 Eng. C. L. 268.)

^g *Williams v. Callender*, Holt, 307. (3 Eng. C. L. 115.) *Newsam v. Carr*, 2 Stark. 70. (3 Eng. C. L. 249.) *Earl of Leicester v. Walter*, 2 Camp. 251. 2 Stark. Ev. 469.

^h *Jones v. Stevens*, 11 Price, 235.

ⁱ *Bennett v. Bennett*, 6 C. & P. 586. (25 Eng. C. L. 551.)

(1) (When previous publications by plaintiff will be admissible. *Beardsley v. Maynard*, 4 Wend. 336. 7 Wend. 560. *Gould v. Weed*, 12 Wend. 12. The publication in a newspaper of rumors cannot be justified by the fact that such rumors existed, though it may be given in evidence in mitigation of the damages. *Skinner v. Powers*, 1 Wend. 451.)

(2) (See *Inman v. Foster*, 8 Wend. 602. *Haines v. Welling*, 7 Ohio, [Part 1.] 254.)

himself by the plaintiff; nor a copy of a work published by the plaintiff, unless he can show that such publications came to his knowledge, and provoked him to write the libel in question.^a

In an action for words, where special damage is the sole cause of action, the defendant may, under the general issue, give the truth of the words in evidence to disprove malice.^b

The defendant has a right to have the whole of the libel submitted to the jury, whose province it is to decide whether it amounts to a libel.

The defendant is entitled to have the whole of the libel read, or the whole of the conversation, in which the words complained of were spoken, detailed in evidence, for he is entitled to have the publication submitted to the jury, that they may judge whether there is evidence of malice on the face of it,^c and to show that the publication, taken altogether, was not calculated to injure the character of the plaintiff.^d Where the alleged libel purported to be a report of a former action for a libel, by the same plaintiff, and the report, after stating the libel and the proceedings at the trial, stated that the jury found a verdict for the plaintiff, with 30*l.* damages; held, that the judge had properly left it to the jury to consider whether the report, though containing some allegations defamatory of the plaintiff, was, if taken altogether, with the statement of the verdict being in his favor, injurious to the character of the plaintiff, or likely to put him in worse estimation than he had been before.^e If the meaning of the publication admits of any doubt, it is for the jury to decide whether it amounts to a libel or not. The judge may tell them what is the legal result of a particular construction, but the construction is for them. Where the judge expressed his decided opinion that the publication was libellous, and the jury, notwithstanding, found a verdict for the defendant; the court refused to disturb the verdict.^f (1) And so on the trial of an indictment or information for a libel; the jury may, by the provisions of the statute, give a general verdict of guilty or not guilty upon the whole matter put in issue, provided *the judge shall give his opinion or direction to them on the matter in issue.^g

^a *Watts v. Fraser*, 2 N. & Perr. 157.

^b *Watson v. Reynolds*, M. & M. 1. (22 Eng. C. L. 238.)

^c *Wright v. Woodgate*, 2 C. M. & R. 573. 1 Gale, 329. *Cooke v. Hughes*, R. & M. 112. (21 Eng. C. L. 393.)

^d *Chalmers v. Payne*, 2 C. M. & R. 156. 1 Gale, 69. *Dicas v. Lawson*, *id.* n.

^e *Chalmers v. Payne*, *supra*.

^f *Empson v. Fairford*, 1 W. W. & Dav. 10.

^g 38 G. III, c. 60.

(1) (In an action for libel, it is the province of the jury, not of the court, to construe words of dubious import; and these are to be interpreted not by the *norma loquendi*, but by the sense in which they were actually uttered. *Kaye v. Brerley*, 4 Watts, 392.)

SECTION XIII.

COSTS.

By 21 Jac. I, c. 16, "in all actions on the case for slanderous words, if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do assess the damages under 40s., the plaintiff shall recover only so much costs as the damages so assessed amount to."

This statute has been held not to extend to actions for libel,^a nor to actions where special damage is the gist of the action;^b but where the words are in themselves actionable, the case is within the statute, though special damage be averred and proved.^c Where there are different counts in the same declaration, some containing words not actionable, and others containing actionable words, and special damages be laid referring to all the counts; the plaintiff will, under a general verdict, be entitled to full costs, though the damages be under 40s.: for some part of the damages must have been given in respect of the special damage.^d So, where the words are actionable and other matter likewise actionable, is stated as a distinct injury and not as a mere consequence of the words; as where the declaration, after stating words imputing a felony, averred that the defendant proved the plaintiff to be imprisoned; the case is not within the statute, and the plaintiff will be entitled to full costs.^e A justification does not entitle the plaintiff to full costs.^f

^a Hall v. Warner, 2 Stark. Sland. 114.

^b Lowe v. Harewood, Sir W. Jones, 196. Collier v. Gaillard, 2 Bl. 1062.

^c 2 Stark. Sland. 114.

^d Saville v. Jardine, 2 H. Bl. 531.

^e Topsall v. Edwards, Cro. Car. 163.

^f Halford v. Smith, 4 East, 567.

*CHAPTER XXII.

TRESPASS.

	PAGE
I. When trespass lies in general	1405
II. Trespass to personal property	1405
III. Trespass for assault and battery	1409
IV. The declaration	1412
V. The pleadings	1413
VI. Replication	1418
VII. New assignment	1422
VIII. Damages	1430
IX. Trespass for false imprisonment	1432
X. Trespass to real property	1438
XI. The declaration	1446
XII. The pleadings	1447
XIII. Trespass for crim. con.	1455
XIV. Trespass for seduction	1462

SECTION I.

WHEN TRESPASS LIES IN GENERAL.

AN action of trespass, *vi et armis*, lies to recover damages for any injuries committed with force to the person, or to real or personal property. Thus it lies for an assault, battery, false imprisonment, or even a *menace*, if accompanied with a consequent inconvenience.^a (1) So it lies for an injury to the relative rights occasioned by force, as for menacing tenants, servants, &c., and beating, wounding, and imprisoning a wife or servant, whereby the landlord, master, or servant hath sustained a loss; though the injury be consequential and not immediate.^b *It lies for criminal conversation with the plaintiff's wife, or for seducing his servant or daughter, *per quod servitium amisit*, force being implied, as the wife and servant have no power to consent.^c

***1402** The injury must be immediate To sustain trespass, the injury must in *general* be immediate, and not consequential, and committed with force, either actual or implied; an injury may be considered immediate when the act complained of itself, and not a mere consequence

^a 3 Bl. Com. 120. "A menace alone without consequent inconvenience, makes not the injury; but to complete the wrong, there must be both of them together." *Id.*

^b *Ditcham v. Bond*, 2 M. & S. 436. 1 Ch. Pl. 167.

^c *Id.* *Woodward v. Watton*, 2 N. R. 476. *Guy v. Livesey*, Cro. Jac. 501. *Fitz. N. B.* 89. *Macfadzen v. Olivant*, 6 East, 387.

(1) (*Hurst v. Carlisle*, 3 Penn. 176.)

of that act, occasions the injury; but the degree of force is immaterial, "as if a log be thrown into the highway, and at the time of its being thrown it hit any person, or even if it were put down in the most quiet way upon a man's foot, it is trespass; but if, after it be thrown, any person going along the road receives an injury by falling over it as it lies there, it is case."^a "If," said Lord Ellenborough, "the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis*, by all the cases both ancient and modern, and it is immaterial whether the injury be wilful or not."^b

It may, however, be observed that, though the *intention* of the wrong doer is immaterial as to the question whether the form of action should be trespass, yet the party injured may waive the trespass and proceed for the *tort*, where the injury is caused not by the *wilful act* but by the negligence of the defendant. As where in an action on the case against three defendants, proprietors of a stage-coach, the declaration stated, that the defendants so carelessly managed their coach and horses, that the coach ran against the plaintiff and broke his leg. It appeared in evidence, that one of the defendants was driving at the time when the accident happened, and the jury found that it happened through his *negligent* driving; the court held, that the plaintiff might maintain *case* against all the proprietors, though perhaps trespass would lie against the proprietor who drove the coach. Bayley, J., "No doubt trespass lies when the injury is inflicted by the *wilful act* of the defendant, but it is also clear that case will lie where the act is negligent and not wilful."^c

When the party injured may waive the tort.

*1403

So where the declaration stated, that the defendant was driving a cart, and took such bad care of the cart and horse, that it ran with great force against the plaintiff's horse, whereby he was much hurt, &c.; on demurrer, the court were clearly of opinion that case would lie, as the injury was alleged to have arisen from the carelessness and negligence of the defendant.^d And whenever the injury is occasioned by the negligence of the defendant, the plaintiff is at liberty to bring an action on the case, notwithstanding the act be immediate, so long as it is not a wilful act.^e Where one driving on the wrong side of

^a Per Le Blanc, J., in *Leame v. Bray*, 3 East, 602. *Scott v. Shepherd*, 2 Bl. 892. 3 Wils. 403. *Reynolds v. Clarke*, 2 Lord Raym. 1402. 1 Stra. 633. Per Lord Kenyon, in *Day v. Edwards*, 5 T. R. 649.

^b Per Lord Ellenborough, in *Leame v. Bray*, 3 East, 599.

^c *Moreton v. Hardern*, 4 B. & C. 223. (10 Eng. C. L. 316.) "Although where the trespass is *wilful*, and there be no ground of action but the trespass, case may not be maintainable; yet, in general, where an actual damage has been sustained, the trespass may be waived, and an action may be maintained on the special circumstances." Per Holroyd, J., *id.* *Pitta v. Gaince*, 1 Salk. 10.

^d *Rogers v. Imbleton*, 2 N. R. 117.

^e *Williams v. Holland*, 10 Bing. 112. (25 Eng. C. L. 50.)

the road, on a dark night, accidentally drove his carriage against another's, it was held, that trespass would lie.^a Where the declaration stated, that *N.*, the defendant, had so carelessly and negligently managed and steered his ship, that it ran foul of the plaintiff's ship, whereby it was greatly damaged; the court held, that *case* would lie, observing, that if the injury had been occasioned by the *wilful act* of the defendant, trespass would be the only remedy.^b Where the defendant drove his gig against another chaise, whereby the plaintiff's wife was injured; held, that trespass would lie; though the chaise was not the property of the plaintiff.^c

- *1404 ^aThe distinction appears to be, that where the act is *wilful*, and the injury immediate, trespass is the only remedy.^d But where the act is not wilful, but the result of negligence, trespass or *case* will lie, at the option of the plaintiff, even though the injury be immediate.^e And where the injury is not immediate, but consequential *case*, and not trespass, is the proper remedy.^f Where a lighted squib was thrown in a market-place, and afterwards thrown about by others in self-defence, and ultimately hit the plaintiff and put his eye out, the injury was considered as the immediate act of the first thrower, who was held to be liable in trespass; the new direction and new force given to it by the other persons not being a new trespass but merely a continuation of the original force.^g Trespass lies, at the suit of an alien, for procuring and influencing a foreign prince to imprison him.^h So it was held, that the captain of a merchant ship was liable in trespass for procuring a mutinous seaman to be flogged and imprisoned in a foreign country by the local authorities.ⁱ

When a trespass will lie against a master for Where the injury has been occasioned by the negligence of the defendant's servant, *trespass* cannot be supported, the only remedy being *case*; unless the act be done in the presence of the master; as where a master and servant were together in a

^a *Leame v. Bray*. *Day v. Edwards*, 5 T. R. 648. *Lotan v. Cross*, and *Covel v. Laming*, 1 Camp. 498.

^b *Ogle v. Barnes*, 8 T. R. 188.

^c *Hopper v. Reeve*, 7 Taunton, 698. (2 Eng. C. L. 260.) 1 Moore, 407. If one ship run against another by the negligence of the pilot, while the owner is on board, *case*, and not trespass, is the proper remedy against the owner.

^d *Id.* *Tripe v. Dyer*, *Coram Gates, J.*, Exeter S. Assiz. 1767, cited 8 T. R. 191, and 6 T. R. 128. Where a person wilfully ran his boat against nets and destroyed them; held, that trespass was the only remedy. *Day v. Edwards*, 5 T. R. 648. *Savignac v. Roome*, 6 T. R. 125. *Williams v. Holland*, 6 C. & P. 23. (25 Eng. C. L. 261.)

^e *Per Curiam*, in *Moreton v. Hardern*, *supra*. *Williams v. Holland*, 10 Bing. 112. (25 Eng. C. L. 50.) *Lloyd v. Needham*, 11 Price, 608.

^f *Per Curiam*, in *Leame v. Bray*, *Day v. Edwards*, *supra*. See title *Case*. *Ante*, 586.

^g *Scott v. Shepherd*, 2 Bl. 892. 3 Wils. 403. This is considered an extreme case, and its authority is very doubtful. See 3 East, 596. 5 Taunt. 534.

^h *Rafael v. Verelst*, 2 Bl. 963. 1055.

ⁱ *Aitken v. Bodwill*, M. & M. 68. (22 Eng. C. L. 252.)

^j *Morley v. Gainsford*, 2 H. Bl. 442. See *ante*, 589.

gig, and the servant was driving when an accident happened; the act of held, that the trespass of the servant was the trespass of the master.^a(1)

*SECTION II.

*1405

TRESPASS TO PERSONAL PROPERTY.

PAGE	PAGE
1. When this action lies.	3. Against whom it lies.
2. Who may maintain it.	1408

1.—*When this action lies.*] TRESPASS lies for taking or injuring all inanimate personal property, and all domiciled and tame animals, as cattle, dogs, &c.; it lies for all animals usually marketable, as parrots, monkeys, &c., in which case it is not necessary to show in the pleadings that they have been reclaimed.^b So it lies for other animals, *feræ naturæ*, which have been reclaimed, or in the possession of the plaintiff, as hawks, rabbits, hares, fish, &c.^c So it lies in some cases in respect of animals, *feræ naturæ*, not reclaimed; as if *A.* start a hare in the ground of *B.* and kill it there, the property continues all the while in *B.*, who may maintain trespass against *A.* for taking it; but if *A.* start a hare in the ground of *B.*, and hunt it in the ground of *C.*, and kill it there, the property is in *A.*, but he is liable to an action of trespass for hunting in the grounds as well of *B.* as of *C.*;^d and if after the hare be killed, or run down by the dogs of *A.* in the land of *C.*, *C.* takes the hare, *A.* may maintain trespass against him;^e but it would be otherwise if *C.* took the hare before *A.* reduced it into possession by his dogs or servants.^f

2.—*Who may maintain this action.*] To support an action of trespass, the plaintiff must at the time the injury was committed, have *actual possession* of the thing which is the object of the trespass, or else he must have a *constructive possession* in respect of the right being actually vested in him.^g The per-
The plaintiff must have actual possession, or a right of

^a Chandler v. Broughton, 1 C. & M. 99. 3 Tyr. 230.

^b Com. Dig. Trespass, (A. 1.) (Trove, C.) 1 Saund. 84. Grymes v. Shark, Cro. Jac. 262. F. N. B. 86.

^c Per Holt, C. J., in Sutton v. Moody, 1 Lord Raym. 250. 2 Salk. 556. 2 Bl. Com. 419. Godb. 123.

^d Churchward v. Studdy, 14 East, 249. ^e *Id.*

^f Per Ashhurst, J., in Smith v. Milles, 1 T. R. 480.

(1) (It will lie against a person, whose servant takes property by *mistake*, where no direction or authority is given by him to the servant to take the particular property in question, and where there is no subsequent assent or approbation, with a knowledge of the trespass. Broughton v. Whallon, 8 Wend. 474.)

possession.

son *in *actual possession* of the property, even though he has no right to it, may maintain trespass against any person but the real owner.*⁽¹⁾ So may a bailee, as a carrier, factor, pawnee, or a sheriff;^b and even a mere gratuitous bailee,^c or an executor *de son tort* may maintain trespass for an injury done to the property while in his possession.^d And if a sheriff omit to continue in possession of the goods under an execution, he cannot maintain trespass. As where a sheriff's officer seized a table in the name of all the goods in the house, and locked up his warrant in the table drawer, and left the house without leaving any person in possession; it was held, that the sheriff could not maintain trespass against the landlord for distraining the goods for rent afterwards, for the sheriff abandoned the possession.^e And where the sheriff seizes goods in the possession of a party who obtained them through fraud, the sheriff cannot maintain an action against the real owner for rescuing them out of his custody.^f(2)

A party entitled to immediate possession may maintain trespass.

We have seen that *actual possession* with a *qualified title* to the property, or even *without any title*, will enable a party to maintain this action; it may be further observed, that as the right of property in personal chattels, for all civil purposes, draws to it the possession, a person who has the absolute property, or an interest in the goods, may maintain trespass, although he has never had the *actual possession*, provided he be entitled to immediate possession. Thus, where *A.* commissioned a party to buy a cow for him, who bought it accordingly, but before the cow came into the possession of *A.*, or he assented to the purchase, it was taken away by the defendant; held, that *A.* might maintain trespass for the cow, for he had a *property in her at his election, and by bringing the action he elected to take the bargain.*

*1407

So the owner of tithe may maintain trespass against the occupier of the land, for turning in cattle and injuring it after it has been set out.^a So the grantee of waifs, estrays, and a wreck within a manor may before seizure maintain trespass against a wrong doer for taking them away.ⁱ So an executor

* 2 Saund. 47, c. Blackham's case, 1 Salk. 290. Woodson v. Newton, 2 Stra. 777. Rackham v. Jesup, 3 Wils. 332. In trespass for seizing goods in the possession of the plaintiff, the defendant cannot set up the title of a third person as a defence. Nelson v. Cherrill, 7 Bing. 663. (20 Eng. C. L. 280.) 1 M. & Scott, 452.

^b 2 Saund. 47, b.

^c Booth v. Wilson, 1 B. & A. 59.

^d Husband v. Smith, 1 Ch. Pl. 151. 170.

^e Blades v. Arundel, 1 M. & S. 711.

^f See Earl of Bristol v. Wilmore, 1 B. & C. 514. (8 Eng. C. L. 146.) 2 D. & R. 755.

^a Thomas v. Phillips, 7 C. & P. 573. (32 Eng. C. L.)

ⁱ Williams v. Lander, 8 T. R. 72.

¹ F. N. B. 91. Com. Dig. Trespass, (B. 4.) Smith v. Milles, 1 T. R. 480. Dunwich v. Sterry, 1 B. & Ad. 831. (20 Eng. C. L. 492.)

(1) (Townsend v. Kerns, 2 Watts, 180. Aikin ads. Bach et al. 1 Wend. 466.)

(2) (An action of trespass *de bonis asportatis* is rightly brought in the name of the person who was the owner of the goods at the time of the trespass, although he may have sold them before the action was commenced. Boynton v. Willard, 10 Pick. 166.)

may maintain trespass for an injury to the personal property of the deceased, after his death and before probate, for the property is vested in him on the death of the testator, and that draws to it the possession.^a So may a legatee after the executor has assented to the legacy, for a trespass committed before such assent.^b

So a person who has leased his land for years without any reservation of the timber, may have trespass *de bonis asportatis* during the continuance of the term, against a third person, who wrongfully cuts down the timber, and after it is severed carries it away.^c And where the trees are excepted in the lease, the lessee has no interest in them; and if he fells them, or damages them, the lessor may maintain trespass against him.^d If the owner of a chattel gratuitously permit another to use it, he may maintain trespass for an injury done to it while it is so used; for in contemplation of law the chattel continues in the possession of the owner.^e But it is otherwise if the chattel be let out for a particular time; as where the plaintiff hired a chariot for a day, appointed the coachman, and furnished the horses; it was held that he might maintain trespass for an injury done to it, and that he might be considered, for the purpose of the declaration, as the owner and proprietor of the chariot.^f *A.* *having let his house ready furnished to *B.*, cannot maintain trespass against the sheriff for taking the furniture under an execution against *B.*, for he parted with the possession.^g But the master of a fly-boat belonging to a canal company, paid by weekly wages, may have trespass for an injury to the boat.^h So a shopkeeper, who has the possession of goods sent to him on sale or return, may maintain trespass for injury done to them.ⁱ

*1408

Where the defendant hired a steam-boat for an excursion, the owner's captain navigating her; it was held, that the defendant had not such possession as to justify him in forcibly turning out a stranger whom the captain allowed to come on board.^j

3.—*Against whom this action lies.*] Trespass lies for unlawfully taking or injuring personal property whilst in the actual or constructive possession of the plaintiff; and not only the party who did the immediate act, but all persons who di-

^a *Id.* 2 Saund. 47. a.

^b Bro. Ab. Trespass, 25. 1 Ch. Pl. 169.

^c Ward v. Andrews, 2 Chit. 636. (18 Eng. C. L. 435.) And see Berry v. Heard, Palmer, 327. Cro. Car. 242. 2 Camp. 592, n. But the lessee cannot maintain trespass under such circumstances, for he has no interest whatsoever in the trees after they are severed from the freehold. Evans v. Evans, 2 Camp. 502.

^d 1 Saund. 322, b.

^e Lotan v. Cross. 2 Camp. 464.

^f Croft v. Alison, 4 B. & A. 590. (6 Eng. C. L. 528.)

^g Ward v. Macauley, 4 T. R. 499.

^h Moore v. Robinson, 2 B. & Ad. 817. (22 Eng. C. L. 189.)

ⁱ Colwill v. Reeves, 2 Camp. 575.

^j Dean v. Hogg, 10 Bing. 345. (25 Eng. C. L. 160.) 4 M. & Scott, 168.

rected or assisted in committing the trespass, are in general liable as principals.^a If a man employs an officer who seizes the goods of a third person under an execution, and the man employing the officer is present at the seizure, he is liable in trespass, if the officer has committed such.^b One who assents to a trespass after it is done, is a trespasser;^c but not unless the trespass was for his benefit; as where *A.* wrongfully took a gun away from the plaintiff, and gave it to *C.*, who refused to return it to plaintiff; it was held, that *C.* was not liable in trespass; unless it could be shown that the gun was seized to his use.^d Trespass may be supported against a sheriff for taking the goods of *A.*, under an execution against *B.*⁽¹⁾

*1409

When
trespass
will lie for
the execu-
tion of a
legal pro-
cess.

A warrant of distress against the overseers of a parish for not paying over the balance in hand, is void, if it does not distinctly set out the summons, the hearing before the magistrates and the refusal to pay. And trespass will lie against the magistrates who sign, and the officers who execute such warrant.^e But trespass will not lie against a sheriff for executing a *fi. fa.* after notice that the defendant had obtained his discharge under the insolvent debtor's act; for the sheriff is justified in obeying the writ, which is not void, but issued through the irregularity of the plaintiff. It differs from those cases where the sheriff sells after a change of property, because there, he does not obey the writ.^f

Where the outgoing tenant covenanted with his landlord to leave the manure on the land, and to sell it to the incoming tenant at a valuation; it was held, that the outgoing tenant might maintain trespass against the incoming tenant, for taking the manure before such valuation, for the possession continued in the outgoing tenant.^g "If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in trespass."^h In general, trespass is not sustainable against a bailee who has the possession coupled with an interest, unless he destroy the chattel, nor against a joint tenant or

^a Co. Litt. 57, a. 2 Inst. 183. Bro. Trespass, Pl. 148. 3 Wils. 377. Where it is said that, procuring, commanding, aiding, or assisting, makes one a trespasser.

^b Meredith v. Flaxman, 5 C. & P. 99. (24 Eng. C. L. 230.)

^c Bro. Trespass, Pl. 113. 3 Wils. 377.

^d Wilson v. Barker, 4 B. & Ad. 614. (24 Eng. C. L. 124.) He "that receiveth a trespasser, and agreeth to a trespass, after it is done, is no trespasser, unless the trespass was done to his use, or for his benefit, and then his agreement subsequent amounteth to a commandment, for in that case *omnis ratihabitio retro trahitur et mandato equiparatur.*" 4 Inst. 317. Recognised in 4 B. & Ad. 616.

^e Saunderson v. Baker, 3 Wils. 309.

^f Harris v. Stewart, 7 C. & P. 779. (32 Eng. C. L.)

^g Whitmore v. Clifton, 1 M. & Rob. 531. Tarlton v. Fisher, Doug. 671.

^h Beaty v. Gibbons, 16 East, 116.

ⁱ Per Lord Ellenborough, C. J., in Leame v. Bray, 3 East, 595.

^j 1 Ch. Pl. 172.

(1) (*Phillips v. Hall*, 8 Wend. 610. *Ross v. Chandler*, 10 Wend. 110.)

a tenant in common for taking away or holding exclusively the property from his co-tenant; but if he destroys the chattel, trespass lies.^a

Where a lessor during the term cut down some oak pollards growing upon the demised premises which were unfit for timber; it was held, that as the tenant for life or years would have been entitled to them if they had been blown down, and was entitled to the usufruct of them during the term, the lessor could not, by wrongfully severing them, acquire any right to them, and consequently that he or his vendee could not maintain trespass against the tenant for taking them.^b

SECTION III.

TRESPASS FOR ASSAULT AND BATTERY.

PAGE	PAGE
1. What constitutes an assault	2. What constitutes a battery. 1410

1.—*What constitutes an assault.*] An assault is an *intentional* attempt by force and violence to do an injury to the person of *another, such as by presenting a gun at him, pointing a pitchfork at him, drawing a sword, or throwing anything at him while he is within reach.* Riding after a person and obliging him to run into a garden to avoid being beaten, is an assault.^d “But it is not every threat, where there is no actual violence, that constitutes an assault; there must be in all cases the means of carrying the threat into effect. If the defendant was advancing in a threatening manner to strike the plaintiff, so that the blow would have reached him within a second or two of time, if the defendant had not been stopped, though not near enough at the time to strike him, it seems to me an assault in law.”^e

Whether the act shall amount to an assault, must in every case be collected from the intention. Where the defendant and another person were fighting, and the plaintiff took hold of the defendant by the collar in order to separate them, whereupon he struck the plaintiff; in a replication of *de injuriâ*, to a plea

^a *Id.* Co. Litt. 200. 2 Saund. 47, g. Martyn v. Knowlys, 8 T. R. 146.

^b Channon v. Patch, 5 B. & C. 897. (12 Eng. C. L. 399.) See Herlakinden's case, 4 Co. 62. Countess of Cumberland's case, Moore, 812. Sadgrove v. Kirby, 1 B. & P. 13.

^c Finch, b. 3, c. 9. Ginner v. Sparkes, Salk. 79. B. N. P. 15. Sel. N. P. 26.

^d Morton v. Shoppee, 3 C. & P. 373. (14 Eng. C. L. 355.)

^e Per Tindal, C. J., Stephens v. Myers, 4 C. & P. 349. (19 Eng. C. L. 414.) Striking at another at such a distance that the blow could not reach him, is not an assault. Com. Dig. Battery, C.

of *son assault demesne*, counsel for the plaintiff proposed to give these facts in evidence, when it was objected that he ought to have replied the matter specially; but Legge, B., overruled the objection that the evidence was not offered in justification, but for the purpose of showing that there was no assault, for it was the *quo animo* which constituted the assault, which was matter to be left to the jury.^a

2.—*What constitutes a battery.*] *Battery*, which always includes an assault is the actual doing an injury, be it ever so slight, upon the person of another, by striking him with a hand, or some instrument, as if a man thrust or push another in anger, or hold him by his arm, or spit in his face, or strike a horse upon which the party rode, whereby he is thrown; or if
 *1411 *in a struggle for the way, or other contest, he touch him, it constitutes a battery, for which an action of trespass, *vi et armis* will lie.^b If a man whips a horse upon which another is riding, and makes it run away, he is guilty of battery upon any person against whom the horse may run. So if *A.* take the hand of *B.*, and strikes *C.* therewith against *B.*'s will, *A.* is guilty of the battery, *B.* not.^c So, striking a horse upon which a party is riding, whereby he is thrown, is a battery.^d In this action it is immaterial whether the act of the defendant was wilful or not (except that the intention may influence the amount of damages.^e) If the injury be occasioned by the negligence, mistake, want of caution, or imprudence of the defendant, he is liable, for no man shall be excused of a trespass except it has been committed utterly without his fault.^f Where the defendant in uncocking a gun discharged it, and thereby wounded the plaintiff, who stood by looking on, it was held a battery.^g(1)

But if the injury be occasioned without any blame being imputable to the party producing it, if he could not have averted the accident by the exercise of any degree of prudence or circumspection, he will not be amenable for the consequences.^h As if a soldier, in a muster, discharge his gun, and another go across, whereby he inevitably and against his will hurts him, it is not a battery in law.ⁱ So where a man was riding along the highway, and his horse, on a sudden fright ran away with

^a *Griffin v. Parsons*, Sel. N. P. 27, n. Where the parish officers cut off the hair of a pauper, against her will, it was held an assault. *Forde v. Skinner*, 4 C. & P. 239. (19 Eng. C. L. 364.)

^b Com. Dig. Battery, (A.) B. N. P. 15.

^c *Per curiam*, in *Gibbons v. Pepper*, Lord Raym. 38.

^d 1 Mod. 24.

^e *James v. Campbell*, 5 C. & P. 372. (24 Eng. C. L. 367.)

^f *Weaver v. Ward*, Hob. 134.

^g *Underwood v. Hewson*, 1 Stra. 596.

^h *Wakeman v. Robinson*, 1 Bing. 213. (8 Eng. C. L. 300.)

ⁱ Com. Dig. Battery, A.

¹ (Where the injury is not the effect of an unavoidable accident, the person by whom it was caused is liable to respond in damages to the sufferer. *Bullock v. Babcock*, 3 Wend. 391.)

him, upon which he called to *J.S.* to get out of the way, which *J.S.* neglected to do, in consequence of which the horse ran over him; held, that the rider was not guilty of battery.^a

Trespass will lie for beating the plaintiff's servant, *per quod servitium amisit*.^b So for an assault and battery on the plaintiff's wife *per quod consortium amisit*.^c *1412

SECTION IV.

THE DECLARATION.

THIS is a transitory action, and the venue may be laid in any county. The day on which the assault was committed should be stated, but it is not necessary to prove that it was committed on the precise day laid in the declaration, for the day is immaterial. The plaintiff may prove trespass at any time before action brought, though it be before or after the day laid in the declaration.^d Where several assaults have been committed on different days, it is usual so to declare in this form,^e "that the defendant, on such a day, and on divers other days and times between that day and some other day," committed the trespasses complained of; and when it is so stated, the plaintiff may give evidence of any number of assaults committed within those days; but he will not be allowed to give evidence of more than *one* assault committed before the first day stated, therefore it would be advisable to state a day so far back as to cover the first assault.^f But as an assault is one entire and individual act, it is improper to declare upon it as having been committed at different times; as where the declaration alleged, that the defendant on such a day, *and on divers other days, &c., made an assault* on the plaintiff; it was held bad on special demurrer.^g But where it was alleged that the plaintiff *assaulted* "on such a day, and *on divers other days, &c.*; it was held good.^h *1413

^a *Gibbons v. Pepper*, *Ld. Raym.* 38.

^b *Ditcham v. Bond*, 2 *M. & S.* 436. And see *Woodward v. Walton*, 2 *N. R.* 476.

^c *Guy v. Livesay*, *Cro. Jac.* 501. ^d *B. N. P.* 86. 1 *Saund.* 24, *n.*

^e Trespass is laid with a *continuando* for several days, to prevent the necessity of bringing several actions. 1 *Saund.* 23, *n. n.*

^f *B. N. P.* 86. 1 *Saund.* 24, *n.* If the plaintiff intends to give evidence of repeated acts of trespass, he must confine himself to the time in the declaration, but he may waive that time and prove an assault at any time before action brought. *Id.*

^g *English v. Purser*, 6 *East*, 395. *Michell v. Neal*, *Cowp.* 838. 1 *Saund.* 24, *n.*

^h *Burgess v. Freelove*, 2 *B. & P.* 425. In this case the court doubted the authority of *Michell v. Neal*; but in *English v. Purser*, Lord Ellenborough distinguished these cases, inasmuch as the word *assaulted* might mean that the defendant committed different assaults at different times.

the plaintiff, after proving one assault, cannot waive that and proceed to give evidence of another.^a It ought to be alleged that the assault was committed *vi et armis* and *contra pacem* &c.; but the omission of this allegation is matter of form, and can only be taken advantage of by *special* demurrer; it is cured by *verdict*.^b

Husband
and wife.

In an action by husband and wife for an assault and battery on the wife, the declaration should not contain any statement of an injury or damage to the husband only; and so, in an action by the husband alone, for an assault on the wife, a statement respecting the personal sufferings of the wife should not be included. In the former case the declaration should conclude to the damage of both.^c(1)

SECTION V.

THE PLEADINGS.

THE general issue in this action is "not guilty," which merely puts in issue the facts of the assault.

*Son assault
demesne.*

*1414

The defendant may justify an assault in defence of his own person; this defence or justification, which is technically termed *son assault demesne*, must be specially pleaded. If the defendant prove that the plaintiff first lifted up his staff and offered to strike him, it is a sufficient assault to justify his striking the plaintiff, and he need not stay until the plaintiff has actually struck him.^d Where declaration stated, that defendant "assaulted plaintiff, and wrenched a stick from his hand, and with the said stick, and with his fists, gave the plaintiff many violent blows, &c., &c. Plea, as to the assaulting the plaintiff with the stick and his fist, &c., *son assault demesne*; held, after verdict, that the plea sufficiently justified the battery with the stick as well as the assault with it.^e But every assault will not justify every battery: it must appear in evidence that the assault was proportionable to the battery.^f Therefore, if *A.* strike *B.*, *B.* cannot justify drawing his sword and cutting off *A.*'s hand; but it must be such an assault whereby in probability the life may be in danger.^g

^a *Stante v. Prickett*, 1 Camp. 473.

^b Statutes 4 Ann. c. 16, ss. 1, and 16; and 17 Car. II, c. 8. 1 Saund. 81, n.

^c Com. Dig. Pleader, 2 A. 1. C. 84. ^d B. N. P. 18.

^e *Blunt v. Beaumont*, 2 C. M. & R. 412. 4 Dowl. 219.

^f *Ib.*

^g *Per Curiam*, in *Cook v. Beal*, 1 Lord Raym. 177. In *Crockford v. Smith*, 2 Salk.

(1) (In trespass for an assault and battery, a loss from a battery, which is not a part of the original injury, but arises consequentially, and in part from circumstances unconnected with the battery, is waived, if not specially laid. *Robinson v. Stokely*, 3 Watts, 270.)

A husband may justify an assault in defence of his wife,^a or a wife in defence of her husband,^b or a servant in defence of a master; but not *e contra*, because a master may have an action *per quod servitium amisit*.^c But a servant is not justified in assaulting a person out of revenge for having struck his master in his presence; he is warranted in so doing, only to prevent an injury to his master; therefore, if the plaintiff has left off assaulting the master, the servant is not in law justified in striking him.^d

The defendant may also justify an assault and battery in defence of his possession or property. "If one enter my ground I must request him to depart before I lay hands on him to turn him out; for every *impositio manuum* is an assault and battery, which cannot be justified upon breaking the close, without a request. But in case of actual force, it is lawful to oppose force to force, and if one break down the gate, or come into my close *vi et armis*, I need not request him to be gone, but lay hands on him immediately, for it is but returning violence with violence. So if one comes forcibly and takes away my goods, I may oppose him, for there is no time to make a request."^e The general form of pleading has been by *molliter manus imposuit*, and on this ground, that the defendant ought not in the first instance to begin with striking the plaintiff, but the law allows him, either in defence of his person or possession, to lay his hand on the plaintiff, and then he may say, if any further mischief ensued, it was in consequence of the plaintiff's own act; so that the battery follows from the resistance.^f Where to trespass for an assault and battery the defendant pleaded, that the plaintiff with force and arms, and with a strong hand, endeavored forcibly to break and enter the plaintiff's close, whereupon the defendant resisted and opposed such entrance, and if any damage happened to the plaintiff, it was in the defence of the possession of the said close; it was held good, Lord Kenyon, C. J., observing, that a party may resist and oppose force by force in defence of his possession if necessary, and if the resistance be excessive, the plaintiff may show that in a new assignment.^g

But where the declaration stated, that the defendant made an assault on the plaintiff, and beat, bruised, wounded, and with great force and violence knocked her down, the court held, that a plea of "*molliter manus imposuit*, in order to turn the plain-

642, the doctrine laid down seems to go to this, that *non assualt desmeme* the violence must in some measure be commensurate with the provocation. Per Littledale, J., in *Reece v. Taylor*, 1 Harr. & Woll. 16. 4 N. & M. 470. (30 Eng. C. L. 388.)

^a 2 Roll. Ab. 546.

^b *Seward v. Basely*, 1 Lord Raym. 62. Salk. 407.

^c *Per Curiam*, *id.* B. N. P. 8.

^d *Barfoot v. Reynolds*, Stra. 953.

^e *Per Curiam*, in *Green v. Goddard*, 2 Salk. 641. *Tully v. Reed*, 1 C. & P. 6. (11 Eng. C. L. 297.)

^f *Per Lawrence, J.*, in *Weaver v. Bush*, 8 T. R. 81.

^g *Weaver v. Bush*, *supra*.

tiff out of the defendant's house, where she continued against his will," was not a sufficient answer to the charge, as it did not show that the plaintiff made resistance and assaulted the defendant.^a It seems clear that the defendant cannot in any case justify an actual *beating* and *wounding*, unless he shows in his plea that force was used or attempted on the part of the plaintiff; but still he may justify the *beating*, that is to say, what in law amounts to a battery, by way of *molliter manus*; for it has been held, that a justification of "assaulting, seizing, and grasping the plaintiff," in order to turn him out of a vestry room, amounted to a justification of battery within the meaning of 22 & 23 Car. II, c. 9, as to costs.^b An officer *cannot justify a battery by virtue of an arrest under process; for an arrest can be made without touching the person; unless it can be shown, that the plaintiff resisted or attempted to rescue himself, the defendant should plead *not guilty* to the battery, and a justification as to the assault; though he may, by way of *molliter manus*, justify a beating without showing any resistance or attempt to rescue, and if the beating amounted to any thing more than a mere battery in law, the plaintiff must new assign.^c In an action of trespass for throwing water on the plaintiff, it is no justification that he persevered, after a request to desist, in obstructing an ancient window of the defendant's house.^d

Allegation of possession.

In a justification of a defence of property, it is sufficient to allege that the plaintiff was possessed, without setting forth the particulars of his title; for such an allegation is merely matter of inducement, and need not be so certain as where the title or interest of the party comes in question.^e Where a shire-hall had always been used for the holding of county musical festivals; it was held, that the stewards of one of these festivals had such a possession of the hall as to justify them in turning out an intruder, though it did not appear that the justices, in whom the property of the hall was vested by act of parliament, had sanctioned the holding of festivals therein.^f

Justification of moderate correction.

We have seen that a person may justify an assault in defence of his person or property, his master, or wife, &c., it remains to observe, that a master may justify the moderate correction of his servant or apprentice, a father the correction of his child, a schoolmaster that of his pupil, and an officer may justify the moderate correction of those who are placed under him, if they prove disobedient or refractory.^g But in all such cases, the jus-

^a Gregory et uxor v. Hill, 8 T. R. 299.

^b Smith v. Edge, 6 T. R. 563. Johnson v. Northwood, 7 Taunt. 689. (3 Eng. C. L. 257.) 1 Saund. 5th ed. 296, n.

^c B. N. P. 19. 1 Saund. 296, n. Willes, 17, n. See Truscott v. Carpenter, 1 Lord Raym. 229.

^d Simpson v. Morris, 4 Taunt. 821.

^e Johns v. Whitley, 3 Wils. 65. Weaver v. Bush, 8 T. R. 78. Skovill v. Avery, Cro. Car. 138.

^f Thomas v. Marsh. 5 C. & P. 596. (34 Eng. C. L. 470.)

^g B. N. P. 18. Mathews v. Carey, 3 Mod. 137.

tification, to prove available, must be specially pleaded. In a justification of moderate correction of a *seaman for disobedience, of which he was found guilty by a court martial, the finding of the court should be specially pleaded, otherwise it will not operate as an estoppel.^a

*1417

Trespass for an assault and battery, plea not guilty. At the trial, it appeared the defendant was captain of a ship, and the plaintiff one of his crew, who had been severely beaten by order of the defendant, from which his health had much suffered. On behalf of the defendant, an attempt was made to show that the beating in question was given by way of punishment for misbehaviour on board the ship, but Lord Eldon, before whom the cause was tried, told the jury that the only question for their consideration was, whether the defendant was guilty of the beating, and what damages the plaintiff had sustained in consequence of it; that though the beating in question, however severe, might possibly be justified, on the ground of the necessity of maintaining discipline on board the ship, yet that such a defence could not be resorted to unless put on the record in the shape of a special justification; and as there was no plea of justification in this case, that the jury should give damages to the extent of the evil suffered. On a motion for a new trial, after verdict for the plaintiff, the court held the direction to be right.^b

Where there are a series of matters complained of in trespass, and the plea amounts to a justification of all; in order to entitle the defendant to a verdict, it is incumbent upon him to make out all the material allegations in his plea. Therefore, where the declaration complained of an assault, putting the plaintiff out of a shop, and imprisoning him in custody of a police-officer, and the plea was *molliter manus imposuit*, to remove the plaintiff from the defendant's shop, and a justification of the imprisonment, because the plaintiff had assaulted defendant, and the assault on the defendant was not proved; held, that, although without it, the first part of the plea was sustainable, yet, being a material allegation to maintain the plea *as to the imprisonment, it was necessary to prove it to entitle the defendant to a verdict.^c Where the declaration alleged an assault, in seizing and laying hold of the plaintiff, pulling and dragging him about, striking him, forcing him out of a field into and through a pond, and then imprisoning him; plea, justifying the assaulting, seizing, and laying hold of the plaintiff, and pulling and dragging him about; held, no sufficient answer to the entire charge in the declaration.^d

All the material allegations in the justification must be proved.

*1418

^a *Hannaford v. Hunn*, 2 C. & P. 148. (10 Eng. C. L. 65.) A music master in a cathedral is not justified in even moderately beating a chorister for singing at a catch club, though such singing might be injurious to his performing in the cathedral. *Newman v. Bennett*, 2 Chitty, 195. (18 Eng. C. L. 303.)

^b *Watson v. Christie*, 2 B. & P. 224.

^c *Reece v. Taylor*, 4 M. & M. 470. (30 Eng. C. L. 388.) 1 H. & W. 15.

^d *Bush v. Parker*, 4 M. & Scott, 588. 1 Bing. N. C. 72. (27 Eng. C. L. 312.)

Where in trespass for assaulting the plaintiff with the defendant's hands, and with a truncheon beating, bruising, and wounding, and ill-treating, &c., the defendant pleaded, 1st, not guilty; and secondly, as to the *assaulting, beating, and ill-treating*, that the plaintiff, a female, came into his house, created a disturbance there, and refused to leave it on being requested so to do, whereupon the defendant, *molliter manus*, &c.; held, that this plea was no justification of the striking and wounding with the truncheon.^a

But if the defendant proves as much of his plea as is necessary to cover the declaration, he need not prove what is unnecessarily alleged. As where in an action for false imprisonment, the defendant pleaded that he gave the plaintiff in charge for a felony to a policeman, who, because the plaintiff resisted, beat the plaintiff, and took him to a station-house. There was no evidence, either of any resistance by the plaintiff, or of any blow given by the policeman; held, that on proof of the other allegation, the plea was substantially made out.^b

SECTION VI.

REPLICATION.

When *de injuria sua propria* is a proper replication.

If the plea of justification consists of a matter of fact, triable by a jury, as *son assault demesne*, defence of a father or property, and be wholly untrue, the replication or general traverse, *de injuria sua propria absque tali causa*, is in general proper. So if a title be alleged as an inducement only; as if to a declaration for an assault and battery, the defendant pleaded that he was possessed or seised in fee of a close, and had cut his corn, and the plaintiff came to take it away, and the defendant, in defence thereof, assaulted the plaintiff; then the plaintiff may reply *de injuria sua propria*.^c

- *1419 But if the plea be true, and the plaintiff did in fact commit "the first assault, but *can justify it*, as if he did it in defence of his master, his wife, or his possession, he must reply specially; for he cannot give such matter of justification in evidence under the general traverse *de injuriâ*.^d In action for an assault, the declaration stated that the defendant beat, bruised, and wounded the plaintiff; to a plea of *son assault demesne*, the plaintiff replied *de injuriâ*, and at the trial it appeared that the plaintiff got off his horse, and held up his stick at the de-

^a Oakes v. Wood, 2 Mees. & Wels. 791.

^b Atkinson v. Warne, 6 C. & P. 687. (25 Eng. C. L. 599.) 1 C. M. & R. 827.

^c 2 Saund. 295, n. Taylor v. Markham, Yelv. 157. Jones v. Kitchen, 1 B. & P. 76.

^d B. N. P. 18. 1 Chitty, Pl. 593.

fendant, who thereupon struck him; the court held, that the plaintiff ought to have replied specially; and it having been left to the jury, whether the plaintiff was so far the aggressor as to justify the assault, and they having found in the affirmative, the court refused to disturb the verdict.^a

In an action for an assault, if the defendant plead *son assault demesne*, or that he arrested the plaintiff upon hue and cry levied, *de injuriâ*, is a good replication, for it consists only of matter of excuse.^b So if the defence be a moderate correction of a servant for his neglect of service, *de injuriâ*, &c., is a good replication, if the plea be untrue.^c But such replication does not put in issue "the moderateness of the chastisement;" to raise that question the plaintiff must reply "excess."^d So, if to a declaration for an assault and battery, the defendant pleads that he was *seised in fee* of a close, and had cut his corn, and the plaintiff came to take away his corn, and the defendant in defence thereof, &c., *de injuria* or *de son tort*, is a good replication; for title is alleged only as a matter of inducement, and the defendant, in his action, claims nothing in the soil or corn, but only damages for the battery, which is merely *collateral* to the title.^e

So in trespass to *personal property*, if the defendant merely *justify the chasing cattle, or removing goods from land of which he was *possessed*, the replication *de injuriâ* will be sufficient.^f Where to a plea in trespass *de bonis asportatis*, justifying the removal of chattels, because they incumbered a close of which the defendant was *possessed*, &c.; the plaintiff replied as to part of the goods, *de injuriâ*, &c., and as to the other part, *extra* force and violence; it was held good on special demurrer, for such a replication may afford several answers to different portions of the chattels; for some of the goods on which the defendant trespassed, might not have been on the close at all; and such as were, might have been treated with unnecessary violence in the removal of them. The plaintiff, therefore, ought to be permitted to present these facts in answer to the plea. Though the mode of pleading was uncommon, still there was no objection to it in law.^g

De injuria sua propria is improper whenever the defendant by his plea claims any interest in the land, or the subject matter in respect of which the plaintiff declares, as a right to dis-
train for rent in arrear, or a right of common, a right of way, *replication de injuria is improper.*

^a Dale v. Wood, 7 Moor. 33. (27 Eng. C. L. 69.)

^b 1 Saund. 244, c.

^c Gilbert, Hist. C. P. 154. 1 Ch. Pl. 606.

^d Penn v. Ward, 1 Gale, 189. 2 C. M. & R. 338.

^e 2 Saund. 295, a. Com. Dig. Pleader, F. 21. In 1 Ch. Pl. 592, there is a *quære* put to this case, with a reference to Willes, 101, which rather supports the case; for there it is said, "that in an action for assault and battery, the title of the land can never possibly come to be material." And see Vivian v. Jenkins, 1 H. & W. 475.

^f *Id.* Taylor v. Eastwood, 1 East, 202.

^g Vivian v. Jenkins, 1 H. & W. 468. 5 N. & M. 14.

or the like; in all such cases the plaintiff should reply specially according to the facts.^a So where the defence rests upon an authority of law, as a process warrant, &c., or as the servant of another, or by his command, or upon an authority or power derived from the plaintiff; or if the plea contain matter of record not stated merely as inducement; in all such cases, the plaintiff must either deny the title, authority, &c., according to the facts of each particular case, or protesting, (which in effect admits these matters,) he must reply *de injuriâ absque residuo causæ*.^b Where matter of record is denied, the replication should be *nul tiel record*.

What *de injuriâ* puts in issue.

*1421

De injuriâ does not put in issue the intention with which an authority given by law is exercised.

By the replication *de injuria sua propria*, the whole matter of the plea is put in issue, and must be substantially proved "as far as it is material to constitute a justification; for the cause alleged is the *matter of excuse* alleged, and all the material allegations form but one cause or excuse."

Where to trespass for an assault, the defendant pleaded that the plaintiff created a noise and disturbance in his house, and that in defence of his possession he gently laid his hands on her, &c.,—replication *de injuriâ*; held, that upon this issue the motive or intention with which the defendant committed the assault, whether it was from a previous feeling of hostility, or from a sudden transport of passion, could not be inquired into, and that the defendant was entitled to a verdict on proving the facts stated in his plea; for as it thereby appeared that he did no more than he was by law authorised to do, his conduct was justified, whatever might have been his motive.^d

Where the plaintiff declared for breaking and entering his house, imprisoning him; and for an assault and battery; and the defendant justified entering the house and arresting the plaintiff under a writ of attachment and a sheriff's warrant upon it, and alleged, that because the plaintiff, after he had been so arrested, behaved and conducted himself in a violent and outrageous manner, and could not otherwise be kept in safe cus-

^a Crogate's case, 8 Co. 67. 2 Saund. 295, *a*. Cockerill v. Armstrong, Willes, 99. Com. Dig. Plead. F. 21.

^b *Id.* Cooper v. Monks, Willes, 52. Hooker v. Nye 1 C. M. & R. 258. Vivian v. Jenkins, 1 H. & W. 468.

^c Crogate's case, 8 Co. 67. Com. Dig. Plead. (F. 18.)

^d *Id.* See Lucas v. Nockles, 4 Bing. 799. (15 Eng. C. L. 132.) 10 *Id.* 157. (25 Eng. C. L. R. 71.) 7 Bligh, N. S. 140. 1 Clark & Fin. 438., where it was laid down that the *virtute cuius* was traversable where it involved a matter of fact, but not where it involved a mere matter of law. Parke, B., in delivering the judgment of the court in the principal case, said, "If the case of Lucas v. Nockles, had established the general proposition, that the motives and intention with which an authority given by law was exercised, could have been inquired into on the general replication *de injuriâ*, we must have held, that such course must be pursued in all cases, though it might be at variance with the supposed rules of law existing before. But we do not find any such general proposition established either by the opinion of the judges or the judgment of the House of Lords; that case, therefore, cannot be considered as an authority for the general proposition, that motive and intention can be the subject of inquiry on the general traverse." 2 Mees. & Wels. 797.

tody by the defendant, the defendant was obliged to push and pull about the plaintiff; replication *de injuria*, &c. Upon the trial, the arrest under the process was proved, and the plaintiff also proved the battery after the arrest; but the defendant gave no evidence of the outrageous conduct of the plaintiff while in custody; held, that the justification was not proved, and that the plaintiff was entitled to a verdict.^a

But it is sufficient to prove so much of the facts alleged, as will, in point of law, amount to a justification. And if the plea consists of two facts, each of which would, when pleaded alone, amount to a good defence, it will be sufficient for the defendant, if one of those facts be found by the jury.^b And it is sufficient to prove a justification which covers the trespass, although it does not cover the matter of aggravation. As, where to an action for an assault and false imprisonment, the defendant pleaded that he was possessed of a shop, and that the plaintiff had been making great noise there, and disturbed the defendant in the peaceable possession of his shop, in *breach of the king's peace*, and that he caused a great concourse of persons to assemble and disturb the defendant, and thereby caused a riot and disturbance, whereupon the defendant, *in order to preserve the peace*, gave the plaintiff in charge to policemen, who took ^{*}him to a station house, and thence before a magistrate, who discharged him; held, that even without the allegation of riot, the plea disclosed a sufficient justification; and that the facts stated, amounted to a breach of the peace, and justified the defendant in directing the imprisonment.^c So, where in trespass for breaking and entering the plaintiff's house, and *expelling* him therefrom, the defendant only justified the breaking and entering; it was held sufficient, for the breaking and entering were the gist of the action, and the expulsion was only matter of aggravation. If the plaintiff had wished to take advantage of it, he should have shown it in a new assignment;^d for where any thing is inserted in the declaration, as *matter of aggravation*, the plea need not answer or justify that, for the answering of that which is the gist of the action, will cover the whole of the declaration.^e

*1422

^a Phillips v. Howgate, 5 B. & A. 220. (7 Eng. C. L. 74.) Reece v. Taylor, 1 H. & W. 15. 4 N. & M. 469. (30 Eng. C. L. 388.) Timothy v. Simpson, 1 C. M. & R. 757. 5 Tyr. 244. A new assignment in such a case is not necessary, because until the allegations in the plea were proved, the question of excess could not be raised.

^b Spilshury v. Micklethwaite, 1 Taunt. 146. See Reece v. Taylor, *ante*, 1418.

^c Cohen v. Huskisson, 2 Mees. & Wels. 477. See Timothy v. Simpson, 1 C. M. & R. 757.

^d Taylor v. Cole, 3 T. R. 292. 1 H. Bl. 555.

^e 1 Saund. 23, *a.* Monprivatt v. Smith, 2 Camp. 175. Lambert v. Hodgson, 1 Bing. 317. (8 Eng. C. L. 333.)

SECTION VII.

NEW ASSIGNMENT.

A NEW assignment is in the nature of a new declaration, or rather it is a repetition of the declaration, differing only in this, that it distinguishes the true ground of complaint as being different from that which is covered by the plea, and it is consequently to be formed with as much certainty or specification of circumstances as the declaration itself.^a Where the defendant has committed several trespasses either upon the person, personal or real property of another, some of which were justifiable and others not, and the action is brought for those trespasses which were not justifiable, but the defendant by his plea answers only those which were so, the plaintiff should *new assign*. Thus, in an action of trespass for an assault, if there have been two assaults, one justifiable on the ground of

*1423 *its having been committed in self defence, and the other not; and the declaration contains only one count for an assault, and the defendant pleads *son assault demesne*; the plaintiff should new assign the illegal assault, viz., by stating that he brought this action not for the assault alluded to and answered in the plea, but for *another* and a different assault committed on a different occasion; otherwise, if the defendant proves the justification he will be entitled to a verdict, for the plaintiff will not be allowed to give evidence of an assault committed on a different occasion.^b For when the trespass in the plea is alleged to be the same trespass which is in the declaration, if the plaintiff *traverses* the cause of justification he thereby admits it to be the same trespass, and he cannot afterwards give evidence at the trial that the trespass in the plea is a different one from that intended in the declaration; hence, the foundation of a new assignment.^c

If the plaintiff were arrested on a warrant granted *previously* to the issuing or delivery of the writ, and in an action for an assault and false imprisonment the defendant justify under the writ upon which the plaintiff was arrested, the plaintiff should new assign.^d So, where the plaintiff was properly arrested at first, but is detained after he has been duly discharged by the person at whose suit he was in custody, and in an action for false imprisonment the defendant justify under the writ upon which the plaintiff was arrested, the plaintiff should new assign the subsequent detention.^e

^a 1 Saund. 299, c. 1 Ch. Pl. 694. Steph. Pl. 245.

^b 1 Saund. 299, a. 1 Ch. Pl. 696.

^c 2 Saund. 5, c.

^d 1 Saund. 299, a.

^e *Id.* See also Lambert v. Hodgson, 8 Moore, 326. 1 Bing. 317. (8 Eng. C. L. 333.)

It has been said that in an action for an assault and battery the plaintiff may give evidence of *excess*, i. e. that the battery was more than was necessary for self defence, under *de injuriâ*, without a special replication or new assignment.^a But according to all the authorities, matters of aggravation or *excess* must be *newly assigned*.^b Declaration for beating, bruising and wounding; plea, son assault; replication, *de injuriâ*. It appeared at the trial that the plaintiff meeting the defendant shook his stick at him, whereupon the defendant beat the plaintiff in an outrageous manner. It having been left to the jury whether the plaintiff was so far the aggressor as to justify the violent conduct of the defendant, and the jury having found a verdict for the defendant, the court held, that if the defendant had assaulted the plaintiff in a more violent manner than was necessary, the plaintiff ought to have replied to the matter specially.^c But where the plea justifies a battery as well as an assault, and the plaintiff proves it, the defendant must prove enough of his plea to justify the battery, and the plaintiff need not new assign.^d A replication *de injuriâ* with a *new assignment* that the defendant committed the trespass with more violence than was necessary for the purposes in the plea mentioned, is demurrable for duplicity.^e

Matter of aggravation must be newly assigned.
*1424

In these cases, however, a new assignment is only necessary where there is but *one* count in the declaration, for if there be as many counts as there are assaults, some of which the defendant cannot justify, the plaintiff may prove these *without* a new assignment; as, if there be two assaults and the defendant can justify only one, if the plaintiff prove two he will be entitled to a verdict;^f and in such cases a new assignment is sometimes injudicious, as, if there be two counts for an assault and false imprisonment, and the defendant plead not guilty to both, and a justification under mesne process as to the first count, the plaintiff had better traverse the justification, and in case the defendant proves it, give evidence of the false imprisonment on the second count, than make a new assignment; for if he new assigns he thereby admits the first assault to be justified, and *therefore*, abandons the first count; and if he fails in proving

A new assignment is only necessary when there is but one count in the declaration.

*1425

^a 1 Ch. Pl. 627, on the authority of a *dictum* of Littledale, J., in *Reece v. Taylor*, 1 H. & W. 16, in these terms: "It is generally thought that *excess* ought to be replied, but I do not altogether agree with that." But, in a subsequent case, *Penn v. Ward*, 1 Gale, 191, Bolland, Baron, said, that Littledale, J., had since altered his opinion on the point.

^b *Monprivatt v. Smith*, 2 Camp. 176. And see the cases there cited *in notis*. *Neville v. Cooper*, 2 C. & M. 329. *Penn v. Ward*, 1 Gale, 190. *Price v. Peck*, 1 Bing. N. C. 380. (27 Eng. C. L. 425.) *Bowen v. Parry*, 1 C. & P. 394. (11 Eng. C. L. 433.) *Gale v. Dalrymple*, *id.* 381. (11 Eng. C. L. 427.) *R. & M.* 118. (31 Eng. C. L. 394.)

^c *Dale v. Wood*, 7 Moore, 33. (17 Eng. C. L. 69.)

^d *Per Bayley, B.* *Lambe v. Barnet*, 3 C. & J. 294.

^e *Thomas v. Marsh*, 5 C. & P. 596, (24 Eng. C. L. 471,) *ante*, 1416. *Cheasley v. Barnes*, 10 East, 73. *Franks v. Morrice*, *id.* 81, *n.* 1 Saund. 300, b.

^f *B. Saund.* 299, a. *B. N. P.* 17.

the allegation in the new assignment, the defendant will be entitled to a verdict, for the plaintiff cannot give evidence of either act of trespass on the second count, as the justification of the assault was admitted, and he cannot avail himself of the same act of imprisonment both on the new assignment and also on the second count, though if he had taken issue on the justification, the defendant might not be able to establish it.^a

In transitory actions not only the *time*, but the *place* may be made material by the plea, and the plaintiff must then, if it becomes necessary, new assign the trespass at another time, or place; for a new assignment is used to ascertain with precision and exactness the place or time which had been alleged only generally in the declaration.^b

Trespass
to person-
al prop-
erty.

The rules which govern new assignments in trespasses to the person, are equally applicable in trespasses to personal property in analogous cases. Where in an action of trespass for taking away the plaintiff's oaks, the defendant pleaded that the oaks were standing in a certain close, situate in the manor of *A.*, the freehold of *B.*, who felled them, and justified taking them away by the command of *B.*; it was held that the plaintiff might new assign that the oaks were growing in his own close within the manor of *W.*, and were other oaks from those mentioned in the plea.^c

In trespass for breaking and entering the plaintiff's close, seizing his goods, *casting, flinging and throwing them out*; plea, *first* the general issue, and *secondly* a justification to all the trespasses, "*except the casting, flinging and throwing.*" The plaintiff joined issue on the justification, and had a verdict on the general issue, with damages, but the defendant had a verdict on the justification; on a motion to enter the verdict generally for the defendant, on the ground that as the *casting, flinging and throwing*, were matter of aggravation only, the plaintiff ought to have *new assigned*; the court held, as that part of the trespass was excepted out of the special plea, and therefore not *covered by it, a new assignment was unnecessary; for it is a clear rule of pleading, that a plea cannot be considered as justifying more than it professes to justify; but if that part had not been excepted, it would have been necessary to new assign.^d

*1426

Trespass
to real prop-
erty.

In trespass for an injury to *real* property, where the defendant justifies under a right of way, &c., if the defendant has used the way in a different manner from what he was entitled to do by virtue of the prescription or grant, the plaintiff must new assign.^e So, if in trespass for damage done by the de-

^a Atkinson v. Mattison, 2 T. R. 176. 1 Saund. 299, b.

^b 1 Saund. 300, c. Randle v. Webb, 1 Esp. 38.

^c 1 Saund. 300, a.

^d Neville v. Cooper, 2 C. & M. 329. And see Bush v. Parker, 1 Bing. N. C. 72. (27 Eng. C. L. 312.)

^e 1 Saund. 300, c. Stonehouse v. Christian, 2 T. R. 560. 1 Ch. Pl. 698.

defendant's cattle, the defendant prescribe for common for his cattle, *levant et couchant*, &c., and aver that the cattle in question were commonable cattle; in case some of the cattle were not *levant et couchant*, the plaintiff should new assign that fact, and not traverse the levancy and couchancy; for upon such a traverse it would be sufficient for the defendant to show any thing which excused the trespass, and the number mentioned in the declaration would not be material.^a

In an action for a disturbance of a right of common, if the defendant justifies under a right of common for his cattle, *levant et couchant*, the plaintiff must new assign if he intends to prove a surcharge.^b

If the plaintiff, in trespass *quare clausum fregit*, does not describe the close in which, &c., by abutments or by name, and the defendant plead *liberum tenementum*, the plaintiff must new assign, and state the place with more exactness; otherwise, if the defendant be able to prove that he had any land within the particular parish or place named in the declaration at the time of the supposed trespasses, he will be entitled to a verdict.⁽¹⁾ But if the plaintiff describe the close by name or abutments in the declaration, (which by Reg. Gen. H. T. 4 W. IV, reg. 5, he must do, subject to a special demurrer, if omitted,) and the defendant pleads *liberum tenementum*, without giving a more specific description of the *locus in quo* than the plaintiff had done, the plea cannot be supported. As where the declaration stated a trespass in the plaintiff's close, called the Foldyard, situate in the parish of *A.*; the defendant pleaded *liberum tenementum*, on which the plaintiff took issue without newly assigning; at the trial it appeared that both the plaintiff and the defendant had a close called the Foldyard in the parish of *A.*; held, that the plaintiff was entitled to recover without new assigning; for in order to compel the plaintiff to new assign, as he had described the close in the declaration, the defendant should have given some further description in his plea. The question raised by the issue was, whether the close described in the declaration, as the plaintiff's freehold was the defendant's freehold or not.^d So, where to a plea of *liberum tenementum* the plaintiff new assigned that the *locus in quo* abutted on certain closes, called *A.*, *B.* and *C.*, or some or one of them, to which the defendant again pleaded *liberum tenementum*, and it appeared that the plaintiff had a close abutting on *A.*, and the defendant a close abutting on *B.* and *C.*; it was held that the plaintiff was entitled to a verdict on the new assignment.^e

*1427

^a 1 Saund. 346, *e.*

^b Bower v. Jenkins, 2 Nev. & Perr. 87.

^c Goodright v. Rich, 7 T. R. 335. 1 Saund. 299, *b.*

^d Cooker v. Crompton, 1 B. & C. 489. (8 Eng. C. L. 140.)

^e Lethbridge v. Winter, 2 Bing. 49. (9 Eng. C. L. 311.) 9 Moore, 95.

(1) (*Collum v. Andrews*, 6 Watts, 516.)

A new assignment to a plea of *liberum tenementum*, waives all the trespasses in the place mentioned in the plea.^a Therefore, where the defendant pleaded that the *locus in quo* was part of a common field which had been allotted to him by the feet jury of the manor, and the plaintiff new assigned in a different close, &c., and the defendant pleaded not guilty to the new assignment, and it appeared at the trial that the close was the same, it was held, that the defendant was entitled to a verdict, and that the plaintiff should not be allowed to give evidence of trespasses committed in the place mentioned in the plea; if the defendant had no title to that place, the plaintiff ought to take issue on the justification.^b

Traverse
and new
assign.

*1428

In some cases the plaintiff may traverse or reply to the plea and also new assign. As where the defendant pleaded that the house in the declaration was called *C. house*, and one of the closes *Blackacre*, and the other *Whiteacre*, and that they were his freehold, and the plaintiff traversed that *C. house* and *Blackacre* were the defendant's freehold, and new assigned the trespass in *twenty acres other than *Whiteacre*; it was objected, that by the new assignment the plaintiff had waived the former pleadings as to all, and therefore ought to have omitted the traverse; but the court held, that as the defendant had pleaded in respect of some of the places in which the plaintiff intended to lay some of the trespasses, the plaintiff was at liberty to answer as to that part, and that the defendant was not at liberty to waive his plea thereto, and plead to all *de novo*.^c So, if the defendant plead a right of common, and allege that the trespasses complained of were committed in exercise of that right, the plaintiff may traverse the right of common, and new assign as to the other trespasses, as that they were committed for different purposes from those mentioned in the plea;^d and in such cases the plaintiff should aver that the action was brought, as well for the trespasses mentioned in the plea, as for the trespass which is new assigned.^e

But where a single act of trespass only has been committed and it is not laid *diversis vicibus et diebus*, which has been justified, the plaintiff cannot traverse the plea and also new assign.^f So, if the plea covers in fact the whole of the trespasses laid in the declaration, the plaintiff cannot reply and new assign. As where the declaration contained several counts, each alleging a single act of trespass, and the defendant justified each of the trespasses, and the plaintiff traversed the justification, and also new assigned in respect of other acts of

^a *Freeston v. Crouch*, Cro. Eliz. 492. 1 Saund. 299, c.

^b *Pratt v. Groome*, 15 East, 235. *Anon.* cited 16 East, 86. 1 Saund. 299, c.

^c 1 Saund. 300, b. *Prettyman v. Lawrence*, Cro. Eliz. 812.

^d *Arlett v. Ellis*, 7 B. & C. 346. (14 Eng. C. L. 53.) *Cross v. Johnson*, 9 B. & C. 613. (17 Eng. C. L. 456.)

^e 1 Saund. 300, c.

^f *Taylor v. Smith*, 7 Taunt. 156. (2 Eng. C. L. 56.) 1 Saund. 300, b.

trespass; the court held, on demurrer, that it was objectionable on the ground of *duplicity*, and that it extended the cause of action beyond what was contained in the declaration.^a

It will be collected from what has been said on this subject, that a new assignment is not necessary where there has been but one single act of trespass; except where that has been of a *continuing* nature, (in which case it may perhaps be said to consist of several acts of trespass,) or *except* where the plea of **liberum tenementum* has rendered a particular description of the *locus in quo* necessary; and, in general, where a new assignment is unnecessary, it will be improper, and sometimes fatal to the plaintiff's right to recover.^b Where in trespass for false imprisonment, the defendant justified under process which was irregular, and the plaintiff new assigned that the trespass complained of was committed on another and different occasion from that stated in the plea, &c.; it was held, that as there was only one arrest and imprisonment proved, the defendant was entitled to a verdict, although the arrest was made without proper authority; for the new assignment admitted that the declaration was well answered by the plea. The plaintiff ought to have traversed the fact pleaded.^c So, if the trespass be committed with more violence than the subject of justification authorised, the plaintiff should reply the excess and not new assign.^d *1429

But if the *excess* be in law strictly justifiable, the plaintiff cannot avail himself by new assigning it; as where the defendant pleaded a right of common, and the removal of certain fences in the exercise thereof, and the plaintiff new assigned, and in support of the new assignment proved that the defendant had pulled down more of the fences than was necessary for the exercise of such right; held, that the defendant was not guilty of an excess; for where fences are *wrongfully* erected upon land subject to a right of common, the commoner has a right to remove the whole of such fences, though the total removal be not necessary to enable him to enjoy the right obstructed.^e If the excess be justifiable, a new assignment of it will not avail.

A replication of excess admits the cause of justification, and precludes the plaintiff from giving evidence to negative the justification. Thus, if the defendant justify as abating a nui-

^a Cheasley v. Barnes, 10 East, 73. 1 Saund. 300, b. Franks v. Morris, *id.*, and Thomas v. Marsh, 5 C. & P. 596, (24 Eng. C. L. 471,) *ante*, 1424.

^b 1 Ch. Pl. 632.

^c Oakley v. Davis, 16 East, 82. 1 Saund. 300, d. Pratt v. Groome, 15 East, 235. *Ante*, 1437.

^d Dale v. Wood, 7 Moore, 33. (17 Eng. C. L. 69.)

^e Arlett v. Ellis, 7 B. & C. 346. (14 Eng. C. L. 53.) Mason v. Cassar, 2 Mod. 65. Badger v. Ford, 3 B. & Ad. 153. (5 Eng. C. L. 247.) Cooper v. Marshall, 1 Burr. 259. The owner of goods which another refuses to deliver up, is justified in using so much violence as is necessary to retake them, and it is for the jury to say whether unnecessary force has been used. Rex v. Milton, M. & M. 107. (14 Eng. C. L. 196.)

sance, *and the plaintiff reply excess, he cannot go into evidence to negative the nuisance.* So, where the defendant justified cutting ropes for the purpose of disengaging two vessels, and issue was taken on a new assignment of excess; it was held, that the plaintiff was bound to prove a clear excess and unnecessary injury.^b Plea, a right of way, to trespass for pulling down a gate; replication, a subsequent conversion of the gate by the defendant; it appeared at the trial that the defendant laid the gate on his own land, where the plaintiff might take it; held, not to amount to a conversion.^c

Where a man abuses an authority or license which the law gives him, by which he becomes a trespasser *ab initio*, if the defendant pleads such license or authority, the plaintiff should reply its abuse;^d for if he new assign that the trespass is a different trespass, he cannot recover, as he can only prove one continued act of trespass, which is admitted by the assignment; for though the defendant becomes a trespasser, *ab initio*, it is not a new trespass.^e

SECTION VIII.

DAMAGES.

In actions for assaults, the circumstances of time and place, when and where the insult is given, require different damages; as it is a greater insult to be beaten upon the Royal Exchange than in a private room.^f It is always the practice to give in evidence the circumstances which accompany and give a character to the trespass, and the jury look into these circumstances and give damages accordingly.^g But nothing can be given in evidence under the general averment, (that the defendant did other wrongs, to the plaintiff,) except acts which could not be put on the record; therefore, in an action for trespass and false imprisonment, Lord Kenyon refused to admit evidence that the plaintiff had been stinted in food during the confinement.^h

*1431

The damages cannot be severed.

In a joint action against several defendants, the damages cannot be severed so as to give more damages against one than against another, but a verdict may be given against both to the amount which the jury think the most culpable ought

* *Id.* Pickering v. Rudd, 1 Stark. 56. (9 Eng. C. L. 293.)

^b Hockles v. Mitchell, 4 Esp. 86.

^c Houghton v. Butler, 4 T. R. 364.

^d 1 Saund. 300, d.

^e Aitkenhead v. Blades, 5 Taunt. 198. (1 Eng. C. L. 75.)

^f Per Bathurst, J., in Tullidge v. Wade, 3 Wils. 19.

^g *Per Curiam*, in Bracegirdle v. Orford, 2 M. & S. 79.

^h Lowden v. Goodrick, Peake, 469.

to pay.^a (1) The plaintiff can have but one satisfaction in damages, though the assault be committed by several, whether the action be brought jointly or severally. In an action of assault, battery and wounding, against two, the one pleads to all, except the wounding, that it was in his own defence, and to the wounding, not guilty; the other justifies all in his own defence. The jury found the first guilty of the wounding, and assessed the damages 20*l.*, and found the issue also against the other defendant, and damages 100*l.* On error, because there ought to be but one judgment for damages, the court reversed the judgment, observing that though the defendants had severed in their pleas, yet when they were found both guilty *of one and the same battery*, one joint damage, ought to have been given by the jury against both.^b If two defendants in trespass suffer judgment by default, and the plaintiff execute writs of inquiry against them separately, and take several damages against them, it is irregular; but the court will permit the plaintiff to set aside his own proceedings, before final judgment, on payment of costs.^c

*SECTION IX.

*1432

TRESPASS FOR FALSE IMPRISONMENT.

	PAGE		PAGE
1. When this action lies in general.		officers.	1434
2. When it lies against public		3. The pleadings.	1437

What constitutes a false imprisonment.

1.—*When this action lies in general.*] Any illegal restraint on the liberty of the person is denominated a false imprisonment, for which an action of trespass *vi et armis* will lie.

^a Brown v. Allen, 4 Esp. 158. Where there are several damages found in trespass, the plaintiff may either take judgment *de melioribus damnis*, or enter a *remittitur*. *Sabin v. Long*, 1 Wils. 30.

^b Crane v. Hummerstone, Cro. Jac. 118. Hill v. Goodchild, 5 Burr. 2790. But, before judgment, the defect of the verdict may be cured, by the entry of a *nolle prosequi* against all the defendants, except one, and taking judgment against that one only. *Rodney v. Strode*, Carth. 19.

^c Mitchell v. Milbank, 6 T. R. 199.

(1) (If a plaintiff in trespass or trover against two or more defendants, has been permitted without objection, to give evidence showing that they had severally committed two or more trespasses or conversions, the jury may, and unless the plaintiff by his election dispense with it, ought to give a verdict finding them guilty severally, and assessing the damages—severally according to the evidence; after which the plaintiff, although he may not perhaps have judgment against them severally, according to the finding of the jury, yet has a right to make his election, and to say for which of the sums assessed as damages, he will take judgment against whomsoever of the defendants it may be found, if he will at the same time enter a *nolle prosequi* against all the other defendants. *Weakly v. Royer*, 3 Watts, 460. Whether after the jury in an action of trespass against two or more defendants, have assessed several damages, the court can render judgment according to the finding *dubitatur*. *Ibid.* See *Halsey v. Woodruff*, 9 Pick. 555.

If a constable tell a person given into his charge, that he must go with him before a magistrate, and such person in consequence goes quietly without any force being used by the constable, it is a sufficient imprisonment to support an action of trespass against the party who gave the plaintiff in charge.^a If a party acts himself in apprehending another, he may be liable in trespass; but if he falsely and maliciously, and without any probable cause, puts the law in motion, that is properly the subject of an action on the case.^b "If," said Eyre, C. J., "the constable, in consequence of the defendant's charge, had for *one moment* taken possession of the plaintiff's person, it would be in point of law an imprisonment, as if he had tapped him on the shoulder and said, 'you are my prisoner;' or if she had submitted herself into his custody, such would be an imprisonment; but the mere giving her in charge without taking possession of her person, where nothing more passes than merely the charge, is not by law a false imprisonment."^c

Where the plaintiff appeared before defendant, a magistrate, to answer the complaint of *A.* for unlawfully killing his dog: defendant advised plaintiff to settle the matter, by paying a sum of money, which plaintiff declined; defendant then said "he would convict plaintiff in a penalty under the trespass
 *1433 *act, in which case he would go to prison;" plaintiff still declined paying, and said he would appeal; defendant then called in a constable, and said, "take this man out and see if they can settle the matter, and if not, bring him in again, as I must proceed to commit him under the act;" plaintiff then went out with the constable and settled the matter, by paying a sum of money; held, that this was an assault and false imprisonment for which trespass would lie; and which, as no conviction had been drawn up, defendant could not justify.^d So, where the plaintiff was in the King's Bench prison, and the defendant served an order on the marshal to have him brought up, and on being brought up, he was committed by the court of King's Bench, on an attachment for nonpayment of costs, and detained in prison; held, to be an assault and imprisonment for which an action would lie; but that the judgment of the court, if specially pleaded, was a justification.^e But where a schoolmaster refused to give up a pupil to his mother, until some arrears of salary were paid, and detained him during the Christmas holidays; it not appearing that the boy was aware of the refusal, or in any way restrained; it was held, that

^a *Chinn v. Morris*, 2 C. & P. 361. (12 Eng. C. L. 171.) R. & M. 424. *Pocock v. Moore*, R. & M. 321. (21 Eng. C. L. 449.) And see *Stonehouse v. Elliott*, 6 T. R. 315. 1 Esp. 379.

^b Per Bayley, J., in *Elsee v. Smith*, 1 D. & R. 103. (16 Eng. C. L. 19.) 2 Chit. 304. (18 Eng. C. L. 344.)

^c Per Eyre, C. J., in *Simpson v. Hill*, 1 Esp. 431. As to what constitutes an arrest, see *ante*, 1290.

^d *Bridgett v. Coyney*, 1 M. & R. 211. (17 Eng. C. L. 244.)

^e *Bryant v. Clutton*, 1 Mees. & Wels. 408. 2 Gale, 50.

an action for false imprisonment could not be maintained by him.^a

A person is not justified in giving a party in charge to a police officer, for insulting him or annoying him in the street; but he may give these circumstances in evidence in mitigation of damages, in an action for false imprisonment.^b

But bare words do not constitute an arrest;^c therefore, if an officer show his warrant to a party charged with an offence, and the latter *voluntarily* attend the officer to a magistrate, it is not such an arrest as will support trespass and false imprisonment; for the warrant is made no other use of than as a summons.^d If a person whose name is William, is asked, before process against him, whether his name is not John, and he *replies in the affirmative, he cannot maintain trespass for imprisonment under the process by the wrong name; for he shall not be allowed to avail himself of the mistake which he himself has occasioned.^e

*1434

2.—*When this action lies against public officers.*] The general rule of law as to actions of trespass against persons having a limited authority is plain and clear. If they do any act beyond the limit of their authority they thereby subject themselves to an action of trespass; but if the act done be within the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such an action.^f Where a magistrate *bonâ fide* committed a person charged with a felony for re-examination for an unreasonable time, without an improper motive, it was held, that trespass for false imprisonment would lie against him, and that the commitment was void from the beginning; because the law did not authorise the magistrate to commit for an unreasonable time.^g The reasonableness of the time is a question to be decided by the jury under the direction of the judge.^h

So where a magistrate maliciously granted a warrant against another, *without any information*, upon a supposed charge of felony, it was held, that trespass would lie against him, for

^a Herring v. Boyle, 1 C. M. & R. 377. 6 C. & P. 496. (25 Eng. C. L. 508.)
^b Thomas v. Powell, 7 C. & P. 807. (32 Eng. C. L.) And see Fraser v. Berkley, id. 621. (32 Eng. C. L.)

^c Genner v. Sparks, 1 Salk. 79.

^d Arrowsmith v. Le Mesurier, 2 N. R. 211. Yet an arrest may be made without touching a person, as if a bailiff comes into a room, and tells the defendant he arrests him, and locks the door, that is an arrest, for he is in the custody of an officer. Per Lord Hardwicke, in Williams v. Jones, Cas. temp. Hard. 301. 2 N. R. 212, n.

^e Per Lord Ellenborough, C. J., in Price v. Harwood, 3 Camp. 108. See Morgans v. Bridges, 1 B. & A. 647.

^f Per Abbott, C. J., in Doswell v. Impey, 1 B. & C. 169. (8 Eng. C. L. 51.) Miller v. Seare, 2 Bl. 1141.

^g Davis v. Capper, 10 B. & C. 98. (31 Eng. C. L. 20.)

^h Id. 35. In this case the recommitment was for fourteen days, which the jury, under the direction of the judge, found to be unreasonable.

- *1435 he was the *immediate* cause of the false imprisonment.* In the *case of a warrant, illegal on the face of it, for an excess of jurisdiction, trespass is maintainable against the committing magistrate, although the conviction has not been quashed.^b An action for false imprisonment will lie against a superior officer, where the imprisonment at first was legal, but was afterwards aggravated by many circumstances of cruelty beyond ordinary bounds.* So where a captain of a man-of-war imprisoned a person for three days for a supposed breach of duty without hearing him, and then released him without bringing him to a court martial.^c If a prisoner in *execution* escape by the voluntary permission of the gaoler, and the gaoler retake him, he is liable in an action of false imprisonment.* The only difference between an arrest on mesne process and in execution is this; on the former, the bailiff may permit the prisoner to go at large, provided he has him at the return of the writ; but in the latter, if the bailiff voluntarily permit the prisoner to go at large, though only for a minute, he cannot afterwards retake him.^f

Trespass will not lie against a judge of a court of record for any thing done by him in the discharge of his duties, nor against a magistrate

But an action will not lie against a judge of a court of record for any matter done by him in the exercise of his judicial functions;^g nor against the Lord Chancellor for anything done in his judicial capacity.^h A judge in a county court is not liable in trespass, if his bailiff take the goods of a wrong person under a warrant issued by him in his judicial character;ⁱ nor will trespass lie against the steward of a court baron, if his bailiff, by mistake, take the goods of *B.* under a precept commanding him to take the goods of *A.*^j nor against a magistrate for anything done under a conviction, unless there be a want of jurisdiction;^k nor for anything done by him in the discharge of his duty however unwarranted by the real facts of the case; unless *he was made acquainted with every fact necessary to enable him to form a judgment as to the course which he ought to pursue;^l nor is a magistrate liable in trespass for committing a

* *Morgan v. Hughes*, 2 T. R. 225. "The general distinction is this: where the immediate act of imprisonment proceeds from the defendant, the action must be trespass, and trespass only; but where the act of imprisonment by the person is in consequence of information by another, there an action upon the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other." Per Ashhurst, J., *id.* 231. A magistrate is not justified in detaining a known person on an intimation that a charge is to be made against him, without an information being regularly laid before him. *Rex v. Birnie*, 1 M. & Rob. 160. 5 C. & P. 206. (24 Eng. C. L. 281.)

^b *Groome v. Forrester*, 5 M. & S. 314.

^c *Wall v. Namara*, cited in 1 T. R. 536.

^d *Id.* 537.

^e *Atkinson v. Mattison*, 3 T. R. 172.

^f Per Ashhurst, J., *id.* 176.

^g Per Lord Tenterden, in *Garnett v. Ferrand*, 6 B. & C. 625. (13 Eng. C. L. 284.) See the cases there cited.

^h *Dicas v. Lord Brougham*, 1 M. & Rob. 309.

ⁱ *Tinsley v. Nassau*, M. & M. 52. 2 C. & P. 583. (12 Eng. C. L. 275.)

^j *Holroyd v. Breare*, 2 B. & A. 473.

^k *Fawcett v. Fowles*, 7 B. & C. 394. (14 Eng. C. L. 59.) 1 M. & R. 102.

^l *Pike v. Carter*, 3 Bing. 78. (11 Eng. C. L. 37.) 10 Moore, 376. *Lowther v. Radnor*, (Earl,) 8 East, 113.

person on a charge of felony made upon oath, although the charge turns out to be unfounded. Where, therefore, the plaintiff was committed by the defendant on a charge under 7 & 8 Geo. IV, c. 30, s. 19, for having maliciously cut down trees adjoining a dwelling-house, and the prosecutor did not appear against him; it was held, that the defendant was not liable in trespass, though it appeared on the face of the depositions that the plaintiff was the occupier of the land on which the trees grew.^a

But a magistrate has no right to direct the imprisonment of a party without examining into the charge. Where a constable took the plaintiff into custody on a charge of disorderly conduct on Sunday, and was taking him before a magistrate on Monday, when he met the magistrate in the street, who desired him to take the plaintiff back to the lock-up house, and bring him up for examination on Tuesday; held, that the magistrate was liable to an action of trespass for false imprisonment. "It is a magistrate's duty," said Patteson J., "on all occasions either to examine into the question, or if there be any reason why he cannot examine into it, he is not to interfere at all, and he should let the constable take the party somewhere else."^b

A magistrate should not direct a party to be imprisoned without examination.

So, where two magistrates having, at a landlord's request, given possession of a dwelling-house as *deserted* and unoccupied, pursuant to 11 Geo. II, c. 19, s. 16, and the judges of assize of the county, on appeal, made an order for the restitution of the farm to the tenant with costs, the latter having brought an action of trespass for the eviction against the magistrates, the constables and the landlord; held, that the proceedings before the magistrates was an answer to the action on behalf of all the defendants; for the magistrates acted as judges of record, and were therefore protected, though they had mistaken the *law*, and the constables and the landlord acted in aid of the justices only.^c

*1437

3.—*The pleadings.*] The general issue in this action is *not* *Plea of guilty*, which merely denies the act done; any matter in excuse or justification of the imprisonment must be specially pleaded, except in those cases where the party is enabled by some statute to give the matter in evidence under the general issue. A private person who acts in aid of a constable, may give that justification in evidence under the general issue.^d But if he be the prime mover, and set the constable in motion by giving the plaintiff in charge to him, he is not within the statute, and therefore will not be permitted to avail himself of matter in justification, unless it be specially pleaded, for the

^a *Mills v. Collett*, 6 Bing. 85. (19 Eng. C. L. 11.) 3 M. & P. 242.

^b *Edwards v. Ferris*, 7 C. & P. 542. (32 Eng. C. L.)

^c *Ashcroft v. Boarne*, 3 B. & Ad. 684. (23 Eng. C. L. 160.)

^d 21 Jac. I, c. 12, s. 2.

person who put the constable in motion is, *prima facie*, a trespasser, and ought to allege and prove the truth of the suggestions on which he induced the constable to act.^a And where there is a doubt, whether a private individual acted as a prime mover, or merely acted in aid of the constable, who undertook to act as of his own authority, is a question of fact for the jury.¹

What will
justify an
arrest.

If a felony has been committed, a private individual may arrest a party on reasonable grounds of suspicion, which is a question of law. "There is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must *prove* that a felony has *actually been committed*; whereas a constable having reasonable ground to suspect that a felony has been committed is authorised to detain the party suspected, until inquiry can be made by the proper authorities;"^c and a plea justifying an arrest, by a private person, "must show the grounds of such suspicion with certainty, in order that the court may judge of its reasonableness."^d A person who is not the owner of an animal is not justified under 5 & 6 W. IV, c. 59, s. 9, in directing a police-officer *to take into custody* a party for ill-treating the animal.^e A private individual may lay hold of a person committing felony, or doing any act which would manifestly endanger the life of another,^f and may detain him until he may reasonably be supposed to have changed his purpose; and if an affray be committed in his presence, he may stay the affrayers until the heat is over, and then deliver them to a constable.^g But a party is not justified in arresting a person on suspicion of having committed a misdemeanor, without a justice's warrant.^h

^a M'Cloughon v. Clayton, Holt, 478. (3 Eng. C. L. 161.) 2 Stark. 445. (3 Eng. C. L. 424.) Bond v. Rust, 2 C. & P. 342. (12 Eng. C. L. 160.) See Hough v. Merchant, M. & M. 510. (23 Eng. C. L. 370.)

^b Staigt v. Gee, 2 Stark. 445. (3 Eng. C. L. 424.) *Id.* Ev. 440.

^c Per Lord Tenterden, in Beckwith v. Philby, 6 B. & C. 638. (13 Eng. C. L. 289.) See Nicholas v. Hardwicke, 5 C. & P. 495. (24 Eng. C. L. 425.) Hall v. Both, 3 N. & M. 316. (28 Eng. C. L. 398.)

^d Mure v. Kaye, 4 Taunt. 34. Where the defendant pleaded the general issue, and a justification that the plaintiff tendered a forged note to one M., and that the defendant (a private person) had probable cause to suspect, and did suspect, that the plaintiff had feloniously uttered the note, knowing it to be forged, wherefore the defendant, &c.; after verdict for the defendant, the court held, that the arrest, though without warrant, was justifiable. Guppy v. Brittlebank, 5 Price, 525.

^e Hopkins v. Crowe, 1 W. W. & Dav. 21. 7 C. & P. 373. (32 Eng. C. L.)

^f Handcock v. Baker, 2 B. & P. 260.

^g Hawk. b. 1. c. 63, b. 3, c. 13, s. 8, c. 12, s. 19. 2 Stark. Ev. 441.

^h Fox v. Gaunt, 3 B. & Ad. 798. (23 Eng. C. L. 187.)

SECTION X.

TRESPASS TO REAL PROPERTY.

	PAGE		PAGE
1. Who may maintain this action.		2. What acts amount to trespass.	1443

TRESPASS is the proper remedy for an illegal entry upon or immediate injury to real property.

1.—*Who may maintain this action.*] To entitle a party to bring trespass for an injury to real property, he must have actual or constructive possession.⁽¹⁾ But it is not necessary that he should have an interest in the soil, or a legal title to the "property." "Generally speaking, actual possession is sufficient to entitle a party to maintain trespass against a wrong-doer, that is established by a great variety of cases; *Chambers v. Donaldson and others*,^a is a very strong authority upon this point. The court there decided, that though the plaintiff had a wrongful possession as against the person in whom the freehold was, yet that such possession was sufficient to enable him to maintain trespass against a wrong-doer, and that unless the defendant acted under the authority of the person in whom the soil and freehold was alleged to be, he could not justify committing a trespass against any person in the actual possession of the law."^b

A party in actual possession may maintain trespass. *1439

A person who has exclusive possession of land, even though it may be for a temporary or limited purpose, may maintain trespass; as where a person contracted with the owner of a close for the purchase of a growing crop of grass; it was held, that he might maintain trespass *quare clausum fregit*, against any person entering the close, and taking the grass, even with the assent of the owner of the land.^c So one who has only the herbage of a forest or close may bring trespass as well as he who has the land.^d So may a person who has an exclusive right of digging turves.^e So where *A.* let a dairy of cows to

Exclusive possession.

^a 11 East, 65.

^b Per Bayley, J., in *Harper v. Charlesworth*, 4 B. & C. 585. (10 Eng. C. L. 419.) In this case the plaintiff was in possession of crown lands with the permission of the crown, and it was held sufficient to enable him to maintain trespass against a wrong doer. 1 Saund. 347, c. *Graham v. Peat*, 1 East, 244. *Harker v. Birkbeck*, 3 Burr. 1563. But a party wrongfully in possession of land cannot maintain trespass against the rightful owner for entering thereon. *Turner v. Meymott*, 1 Bing. 158. (8 Eng. C. L. 280.) 7 Moore, 574.

^c *Crosby v. Wadsworth*, 6 East, 603.

^d 2 Roll. Ab. 549.

^e *Wilson v. Mackreth*, 3 Burr. 1824.

(1) (*Toby v. Reed*, 9 Conn. 216. *Bulkley v. Valbeau*, 7 Conn. 232. *Wheeler v. Hatchkiss*, 10 Conn. 235. *Chatham v. Bruinerd*, 11 Conn. 60.)

B., and agreed that they should be fed in a certain close, in which no other cattle were to be fed; it was held, that *B.* might maintain trespass against or distrain the cattle of *A.* *damage feasant* there; for he had the sole and exclusive right to the occupation of the close.^a A person legally entitled to land having entered, may maintain trespass against a person wrongfully in possession at the time of the entry, and continuing in

*1440 *such possession afterwards.^b The purchaser of a growing crop of grass, sold under a distress, who has nailed up the gates, and made the grass into hay, may maintain trespass against the sheriff for the acts of his bailiff in entering and levying under a *fi. fa.*^c

An easement is not sufficient to maintain trespass.

But where a full grown crop of potatoes was purchased while in the ground, to be taken away *immediately*; it was held, that the purchaser had not such an interest in the soil as would entitle him to maintain trespass *quare clausum fregit*, for he had only an easement, a right to come on the land, for the purpose of carrying away the potatoes.^d A copyholder who holds under a special custom of the manor, a tenant for life, or a tenant for years, may maintain trespass against the lord of the manor for cutting down so many trees as will deprive them of the right of estovers, &c.^e A tenant for years or at will, or at sufferance, may maintain trespass against a stranger, or even against his landlord, unless a right of entry be reserved, or unless the landlord have a right of entry by law; as where the tenancy has expired and the tenant become a trespasser.^f If trees be *not excepted* in a lease for life or years, and the lessor fells them, the lessee may maintain trespass against him for the loss of his interest in the trees, and also for the entry into the land. But where the trees are *excepted* in the lease, the lessee has no manner of interest in them, and the lessor may have trespass against him if he either fells or damages them.^g(1)

What is sufficient possession.

Where proprietors of a canal erected a dam of wood and earth upon a close, with the permission of the owner, for the purpose of completing their work; it was held, that they had

^a *Burt v. Moore*, 5 T. R. 329.

^b *Butcher v. Butcher*, 7 B. & C. 399. (14 Eng. C. L. 59.) 1 M. & R. 220.

^c *Tompkinson v. Russel*, 9 Price, 287.

^d Per Lord Ellenborough, in *Parker v. Staniland*, 11 East, 366.

^e B. N. P. 85.

^f 2 Roll. Ab. 551. Sid. 347. Com. Dig. Trespass, B. 1. 1 Saund. 322. 13 Co. 69. 11 Co. 48. *Turner v. Meymott*, 1 Bing. 158. (8 Eng. C. L. 280.) 7 Moore, 574. *Taunton v. Costar*, 7 T. R. 431.

^g 1 Saund. 322. *b.* *Harlekenden's Case*, 4 Co. 62. *Biddlesford v. Onslow*, 3 Lev. 209. *Ashmead v. Ranger*, 1 Ld. Raym. 552.

(1) (The general property of trees, felled on land in the possession of a tenant for years after severance, is in the owner of the land.—Therefore the owner of land in the possession of such tenant may maintain trespass *de bonis asportatis*, against a stranger, for the carrying away trees, after severance, felled by the defendant on such land. *Bulkeley v. Dolbeau*, 7 Conn. 232.)

a sufficient possession to maintain trespass against a wrong-doer.^a But commissioners of sewers under 23 Hen. VIII, c. 5, have not such possession or interest in their works, as to entitle them to maintain trespass for any injury done thereto, for they have no property in the soil, but merely an authority to do certain acts on behalf of the public;^b nor have the proprietors of a navigation river, made under 16 & 17 Car. II, such property in the soil of the bed of the river, or in the soil of a bank formed of the earth excavated from the channel of the river, as to enable them to maintain trespass for the injury done to such bank, for they have but a mere easement.^c Where the plaintiff had conveyed a chapel built by him to a third person, who took possession thereof, and left the key with the gardener, with permission to allow the plaintiff to preach in the chapel; it was held, that the plaintiff had not such exclusive possession as to enable him to maintain trespass against a wrong-doer.^d Nor will trespass lie for entering into a pew, or seat in a church, as the plaintiff has not the exclusive possession, the possession of the church being in the parson.^e

But the perpetual curate of a chapelry may maintain trespass, even against a churchwarden, for pulling down a pew.^f And it seems, that the owner may maintain trespass for breaking a pew;^g and so may the parson, against a person for preaching in the church without his leave.^h And though the freehold of the church is in the parson, a person who erects a tombstone in the church-yard, may maintain trespass against a party who wrongfully removes it.ⁱ

The gist of this action is possession; it is therefore a general rule, that unless the plaintiff be in actual or constructive possession at the time of the injury being committed, "he cannot maintain trespass: a parson, before induction, cannot maintain trespass.^j But *after* induction he may maintain trespass for an injury to the glebe lands, though he has not taken actual possession of them, for the induction puts him in possession of a part for the whole.^k An heir, before entry, has only a seisin *in law*, and cannot maintain trespass.^l Nor a devisee,^m nor a lessee for years,ⁿ before entry. But on the determination of a

The plaintiff must have actual or constructive possession. *1442

^a Dyson v. Collick, 5 B. & A. 603. (7 Eng. C. L. 203.)

^b The Duke of Newcastle v. Clarke, 2 Moore, 666. 8 Taunt. 602. (4 Eng. C. L. 219.)

^c Hollis v. Goldfinch, 1 B. & C. 305. (8 Eng. C. L. 62.)

^d Revett v. Brown, 5 Bing. 7. (15 Eng. C. L. 345.)

^e Per Buller, J., 1 T. R. 430. Mainwaring v. Giles, 5 B. & A. 356. (7 Eng. C. L. 129.) No action can be maintained for a disturbance of a pew, unless it be annexed to a house, for disturbance is matter of ecclesiastical censure only. 5 B. & A. 361.

^f Jones v. Ellis, 2 Y. & J. 265.

^g 1 Ch. Pl. 174.

^h *Id.* 12 Mod. 420. 433.

ⁱ Spooner v. Brewster, 3 Bing. 136. (11 Eng. C. L. 69.) 2 C. & P. 34. (12 Eng. C. L. 15.)

^j Vin. Ab. Entry, G. 4. Bac. Ab. Leases, M. Plow. 528.

^k Bulwer v. Bulwer, 2 B. & A. 470.

^l Com. Dig. Trespass (B. 3.)

^m 2 Mod. 7.

ⁿ Kilw. 163.

sance,* and the plaintiff reply excess, he cannot go into evidence to negative the nuisance.^a So, where the defendant justified cutting ropes for the purpose of disengaging two vessels, and issue was taken on a new assignment of excess; it was held, that the plaintiff was bound to prove a clear excess and unnecessary injury.^b Plea, a right of way, to trespass for pulling down a gate; replication, a subsequent conversion of the gate by the defendant; it appeared at the trial that the defendant laid the gate on his own land, where the plaintiff might take it; held, not to amount to a conversion.^c

Where a man abuses an authority or license which the law gives him, by which he becomes a trespasser *ab initio*, if the defendant pleads such license or authority, the plaintiff should reply its abuse;^d for if he new assign that the trespass is a different trespass, he cannot recover, as he can only prove one continued act of trespass, which is admitted by the assignment; for though the defendant becomes a trespasser, *ab initio*, it is not a new trespass.^e

SECTION VIII.

DAMAGES.

IN actions for assaults, the circumstances of time and place, when and where the insult is given, require different damages; as it is a greater insult to be beaten upon the Royal Exchange than in a private room.^f It is always the practice to give in evidence the circumstances which accompany and give a character to the trespass, and the jury look into these circumstances and give damages accordingly.^g But nothing can be given in evidence under the general averment, (that the defendant did other wrongs, to the plaintiff,) except acts which could not be put on the record; therefore, in an action for trespass and false imprisonment, Lord Kenyon refused to admit evidence that the plaintiff had been stinted in food during the confinement.^h

*1431

The damages cannot be severed.

In a joint action against several defendants, the damages cannot be severed so as to give more damages against one than against another, but a verdict may be given against both to the amount which the jury think the most culpable ought

^a *Id.* Pickering v. Rudd, 1 Stark. 56. (2 Eng. C. L. 293.)

^b Hockles v. Mitchell, 4 Esp. 86.

^c Houghton v. Butler, 4 T. R. 364.

^d 1 Saund. 300, *d.*

^e Aitkenhead v. Blades, 5 Taunt. 198. (1 Eng. C. L. 75.)

^f Per Bathurst, J., in Tullidge v. Wade, 3 Wils. 19.

^g *Per Curiam*, in Bracegirdle v. Orford, 2 M. & S. 79.

^h Lowden v. Goodrick, Peake, 469.

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*1432

TRESPASS FOR FALSE IMPRISONMENT.

PAGE	PAGE
1. When this action lies in general.	officers. . . . 1434
2. When it lies against public	3. The pleadings. . . 1437

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Where a man abuses an authority or license which the law gives him, by which he becomes a trespasser *ab initio*, if the defendant pleads such license or authority, the plaintiff should reply its abuse;^d for if he new assign that the trespass is a different trespass, he cannot recover, as he can only prove one continued act of trespass, which is admitted by the assignment; for though the defendant becomes a trespasser, *ab initio*, it is not a new trespass.^e

SECTION VIII.

DAMAGES.

IN actions for assaults, the circumstances of time and place, when and where the insult is given, require different damages; as it is a greater insult to be beaten upon the Royal Exchange than in a private room.^f It is always the practice to give in evidence the circumstances which accompany and give a character to the trespass, and the jury look into these circumstances and give damages accordingly.^g But nothing can be given in evidence under the general averment, (that the defendant did other wrongs, to the plaintiff,) except acts which could not be put on the record; therefore, in an action for trespass and false imprisonment, Lord Kenyon refused to admit evidence that the plaintiff had been stinted in food during the confinement.^h

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In a joint action against several defendants, the damages cannot be severed so as to give more damages against one than against another, but a verdict may be given against both to the amount which the jury think the most culpable ought

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PAGE	PAGE
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that the *locus in quo* was not the close of the plaintiff; it was held, that the possession and not the ownership of the close was the issue thereby raised, and that on evidence of possession the plaintiff was entitled to a verdict.^a

Declaration for seizing pigs; plea, that defendant was possessed of a close named *H.*, in which the pigs were eating, &c., and were taken damage feasant; replication, that defendant was not possessed of the said close in the said plea mentioned, in which the pigs were alleged to be eating, &c., and issue thereon; there were several adjacent closes called *H.*; held, that the defendant was bound to show that he was possessed of a close in which the pigs were eating, &c., and that it was not enough for him to show his possession of a close named *H.*^b

As the property in wastes adjoining a high road, trees, hedges, ditches, and party walls, may be tried under this plea, it may be convenient to state in this place what is considered presumptive evidence of a title therein.

*1450
Owner-
ship of
wastes ad-
joining a
high road.

*Where a strip of waste land lies between a highway and an adjoining inclosure, the presumption is, that both the strip of land and the highway *ad medium filum viæ* are the property of the owner of the adjoining inclosure,^c whether he be a freeholder, a leaseholder, or a copyholder;^d but where strips of land so situated are connected with open commons, the presumption is liable to be much weakened by evidence of ownership applicable to such commons.^e Where a reasonable probability exists that a particular district of land formerly belonged to the same owner, acts of ownership done on different parts of such district are admissible as evidence of the same right throughout the whole.^f Where a road through common land is set out by commissioners under an inclosure act, it seems that the usual presumption of law, that it belongs to the owner of the adjoining land, does not apply.^g

Evidence
of owner-
ship.
Property
in trees.

Cutting down trees by the side of a highway, and the cleaning and repairing the way, are evidence of the ownership of the soil.^h If *A.* plant a tree upon the extreme limits of his land, and the tree growing extends its roots into the lands of *B.*, *A.* and *B.* are tenants in common of the tree; but if all the roots grow in *A.*'s land, though the bough shadow the lands of *B.*, yet the property of the whole is in *A.*ⁱ But in a modern case it was decided, that a tree belongs to the owner of the land

^a *Heath v. Wilward*, 2 Bing. N. C. 98. (29 Eng. C. L. 269.) 1 Hodges, 198.

^b *Bond v. Downton*, 2 Adol. & Ellis, 26. (29 Eng. C. L. 18.)

^c *Steel v. Prichett*, 2 Stark. 463. (3 Eng. C. L. 433.) *Stevens v. Whistler*, 11 East, 51.

^d *Doe v. Pearsey*, 7 B. & C. 304. (14 Eng. C. L. 50.) *Doe v. Kemp*, 7 Bing. 332. (30 Eng. C. L. 150.)

^e *Grose v. West*, 7 Taunt. 39. (2 Eng. C. L. 19.) 2 Stark. Ev. 891.

^f *Stanley v. White*, 14 East, 332.

^g *R. v. Edmonton*, 1 M. & Rob. 24.

^h *Vin. Ab. Ev. T. b.* 102. 2 Leon. 148.

ⁱ N. P. 85. *Waterman v. Soper*, 1 Lord Raym. 737.

where it is planted, although the roots extend into other land.^a The general property in trees, or that which is likely to become timber, is in the landlord; and the general property of bushes or trees, not timber, is in the tenant; and the landlord cannot maintain trespass against a stranger for cutting bushes and *thorns growing in a hedge, although cut improperly, if it were *1451 afterwards assented to by the tenant.^b

If two adjacent fields be separated by a hedge and ditch, the hedge *prima facie* belongs to the owner of the field in which the ditch is not; and if there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership.^c "The rule about ditching is this; a person making a ditch cannot cut into his neighbor's soil, but usually he cuts it to the very extremity of his own land, and throws the soil, which he digs out, upon his own land. Therefore, if he afterwards cuts beyond the edge of the ditch, he cuts into his neighbor's land, and is a trespasser; no rule about four feet or eight feet has any thing to do with it."^d "Where lands abutting on a ditch and a lane on each side belong to different owners, the presumption is, that a hedge and ditch, on one side, both belong to the occupier of the land on that side."^e

The common uses of a wall separating adjoining lands, belonging to different owners, is *prima facie* evidence that the wall, and the land upon which it stands, belong to the owners of the adjoining lands, in equal moieties, as tenants in common.^f But where two tenants in severalty built a party wall, at the joint expense of both, under the building act, and the land upon which it was built was contributed in equal moieties; it was held, that the owners of the land were not tenants in common of the wall, or of the land on which it stood.^g

3.—*Right of way.*] By the rules of H. T. 4 W. IV, it is provided, that "where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of way with carriages and cattle, and on foot, in the same plea, and issue is taken thereon, *the plea shall be taken distributively; and if a right of way *1452 with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the tres-

^a Holder v. Coates, M. & M. 112. (22 Eng. C. L. 264.) And see Masters v. Pollie, 2 Roll. Rep. 141; where it is said that if a tree grows in A.'s close, and roots in B.'s, yet the body of the tree being in the soil of A., the residue of it belongs to him.

^b Berriman v. Peacock, 9 Bing. 384. (23 Eng. C. L. 313.) 2 M. & Scott, 524.

^c Guy v. West, S. N. P. 1316.

^d Per Lawrence, J., in Nowles v. Miller, 3 Taunt. 138.

^e Per Bayley, J., Noye v. Reed, 1 M. & R. 65. (17 Eng. C. L. 226.) One tenant in common of a hedge, may maintain trespass against his co-tenant if the latter grub it, but not for merely clipping it. Voyce v. Voyce, Gow. 201.

^f Cubitt v. Porter, 8 B. & C. 257. (15 Eng. C. L. 211.) Wiltshire v. Lidford, id. 259, n. (15 Eng. C. L. 212.)

^g Matto v. Hawkins, 5 Taunt. 20. (1 Eng. C. L. 4.)

passes proved as shall be justified by the right of way so found, and for the plaintiffs in respect of such of the trespasses as shall not be so justified."

And in all cases in which such right of way, or other similar right, is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively. *Id.*

Where in an action of trespass, the plea alleged the user of a way for forty years, as of right, without interruption, and the replication traversed the user *as of right*; held, that under this issue the plaintiff might show, that the defendant had used the way by permission, and that he (the plaintiff) had received payments as an acknowledgment.* The law respecting right of way, has been already considered under the title "Case."^b

Plea of license.

4.—*License.*] Even before the new rules, a license must have been specially pleaded in an action of trespass. If issue be taken upon a plea of license, it will be incumbent on the defendant to prove a license sufficient to authorise him to commit the act complained of; whether the license proved be sufficient, is a question of law. If a party have a license to do an act, it will justify every thing that is necessary for the performance of that act; therefore, if *A.* license *B.* to enter his house to sell goods, *B.* may take assistants if necessary for the purpose of selling the goods; and the license will justify them in entering for that purpose.* The keeping open the doors of a house in which there is a public billiard table, is a license in fact to all persons to enter for the purpose of playing.^d Where the declaration complained of trespasses on *divers days and times*, and the defendant pleaded a license generally; replication, *de injuriâ*, &c.; a *license having been proved which covered some but not all the trespassers; it was held, that the plaintiff was entitled to a verdict, as the defendant did not prove a license co-extensive with the trespasses complained of, for the effect of the replication was to deny such a license.^e

*1453

Excess.
Revoca-
tion.

If the plaintiff did in fact license the defendant, and the latter exceeded the license, or if the plaintiff had revoked the license before the trespass was committed, he must now assign the excess and revocation.^f Yet it has been decided that a revocation may be given in evidence under a plea denying the license, for it shows that there was no license at the time of the trespass.^g

* *Beaseley v. Clarke*, 2 Bing. N. C. 705. (29 Eng. C. L. 462.) 2 Hodges, 100. See *Liddell v. Brown*. *Monmouth Canal Company v. Harford*, *ante*, 576.

^b *Ante*, 571.

^c *Dennet v. Grover*, Willes, 195.

^d *Ditcham v. Bond*, 3 Camp. 525. And if the license be so abused, the plaintiff must now assign. *Id.*

^e *Barnes v. Hunt*, 11 East, 451. 1 Saund. 300, *d.* *Symmons v. Hearson*, 11 Price, 369. The cause in such a case, is the matter of excuse alleged, and the replication, *effect*, denies an excuse co-extensive with the trespasses. 2 Stark. Ev. 838.

^f Saund. 300, *d.* *Ditcham v. Bond*, 3 Camp. 524.

^g *ridge v. Seddall*, 2 Phill. Ev. 194, 7th ed. *Hayward v. Grant*, 1 C. & P. 448.

In trespass for entering a man's house and debauching his daughter, a license to enter is a good bar, for the entry is the gist of the action, and debauching the daughter is matter of aggravation only.^a But entry by license of the plaintiff's wife or servant is not sufficient, unless it be in law the license of the plaintiff.^b Where *A.* gave leave to *B.* to show his house for the purpose of letting it, and the person with whom the key was left having absconded, *B.* in order to show the premises forcibly opened the window; held, that the license was no answer to an action of trespass against *B.* for breaking and entering, for it did not extend to an entry of that kind.^c

A party may justify an entry into the premises of another, under a license in law. Thus, a remainder-man or a reversioner may enter to see whether any waste has been committed on the estate, or the landlord may enter in the absence of a tenant who had omitted to deliver up possession when his term expired.^d A commoner may enter to view his cattle. So, an *entry into an inn or tavern, at all seasonable times, is justifiable. *1454

Where an entry or license is given to any person by law, and he abuses it by *misfeasance*, he will be considered a trespasser *ab initio*.^e But if the defendant pleads a license in law, and the plaintiff intends to rely on an abuse of such license, he must plead it in his replication, for he cannot give it in evidence on an issue taken on the license.^f Where the defendant justifies a trespass for preventing a tortious act of the plaintiff, if the plaintiff relies on a license which rendered his act lawful, he must reply it, for he cannot give it in evidence under *de injuriâ sua propria*.^g

5.—*Other justifications.*] The defendant may justify breaking and entering the plaintiff's close under a legal process, if he had it in fact at the time; although he declared then that he entered for another cause.^h A justification under the process of a civil court, must show that such process has been returned.ⁱ Where in trespass for breaking a dwelling-house, assaulting the plaintiff, &c., the defendant pleaded not guilty, two justifications under a *ca. sa.*, except as to the breaking, &c., alleging that the outer door was open; replication, *de injuria*; held, that as the outer door being open was a condition prece-

^a *Bennet v. Alcot*, 3 T. R. 166.

^b *Cro. Eliz.* 876. 945.

^c *Ancaster v. Milling*, 2 D. & R. 714. (16 Eng. C. L. 118.)

^d *Turner v. Meymott*, 1 Bing. 158. (8 Eng. C. L. 280.)

^e *Six Carpenters' case*, 8 Co. 146.

^f *Aitkenhead v. Blades*, 5 Taunt. 198. (1 Eng. C. L. 75.) *Taylor v. Cole*, 3 T. R. 296.

^g *Taylor v. Smith*, 7 Taunt. 156. (3 Eng. C. L. 56.) A private person may justify breaking and entering the plaintiff's house, and imprisoning him to prevent him from committing a felony. *Handcock v. Baker*, 2 B. & P. 260.

^h *Crowther v. Ramsbottom*, 7 T. R. 654.

ⁱ *Middleton v. Price*, 1 Wils. 17.

dent to the defendant's right to enter and arrest, it was a material averment, and that the plea was sufficiently traversed by the replication; held, secondly, that it being proved that the defendant had broken the outer door, whereby he was a trespasser *ab initio*, the jury were properly directed to give damages for the whole of the injury complained of.^a

*1455 If *A.* wrongfully place his goods on the premises of *B.*, the latter may justify an entry on the premises of *A.* next adjoining, and putting the goods there for his use.^b

The plaintiff declared in trespass for breaking the close, and set out the close by abutments; the defendant justified, alleging that the said close in which, &c., was part of an allotment of six acres, made by commissioners duly authorised for certain purposes, in execution of which he entered; the plaintiff replied, that the close in which, &c., was not part of the six acres, &c., and thereupon issue was joined; it appeared that the close set out by abutments was not *all* within the allotment, but that the part in which the actual trespass occurred was within it; held, that the justification was sufficiently made out, for "the close in which," &c., does not mean the whole close referred to in the declaration, but the place in which the trespass is proved to have happened, and the defendant may so apply it. The trespass was proved in one part of the close only, and the defendant established his right in that part.^c

SECTION XIII.

CRIM. CON.

	PAGE		PAGE
1. When this action lies.		3. Proof of adultery.	1461
2. Proof of marriage.	1456	4. Damages.	1461

1.—*When an action of crim. con. lies.*] An action of trespass lies at the suit of a husband for criminal conversation with his wife.^d But it seems that the husband cannot maintain such an action if he has been in any degree a party to his own dishonor, by permitting his wife to carry on an adulterous intercourse with other men, or by assenting to the particular

^a Kerbey v. Denby, 1 Mees. & Wels. 336.

^b Ray v. Sheward, 2 Mees. & Wels. 424. 1 Mur. & Hur. 68. Vin. Ab. tit. Trespass, Pl. 17. See Houghton v. Butler, 4 T. R. 364.

^c Bassett v. Mitchell, 2 B. & Ad. 99. (22 Eng. C. L. 34.) Richards v. Peake, 2 B. & C. 918. (9 Eng. C. L. 273.)

^d Woodward v. Walton, 2 N. R. 476. Macfadyen v. Olivant, 6 East, 387. Case is a concurrent remedy, but trespass is the usual form. *Id.* Cooke v. Sayer, 2 Wils. 3. N. P. 128.

act of adultery with the defendant, or by having totally and *permanently given up all advantages to be derived from her society.^a It was held in one case that the action could not be maintained where the husband and wife lived apart by a deed of separation.^b But the propriety of that decision was afterwards doubted by Lord Ellenborough, who laid it down, that the right of the husband to maintain such an action was not affected by a separation under a deed, unless it appeared that he renounced all future intercourse and society with his wife.^c If, however, the woman be ever so profligate, unless it be with the husband's privity, it will not operate as a bar to the action; but it will go in mitigation of damages.^d *1456

It was laid down by Lord Kenyon, that if a husband violated the marriage bed, and transgressed the rules of conduct which decency requires, by openly carrying on a criminal intercourse with other women, he could not maintain this action.^e But this doctrine was afterwards disapproved of by Lord Alvanley, who thought that the infidelity or misconduct of the husband could not be set up as a legal defence to the adultery of the wife, that it operated in mitigation of damages only.^f It is no bar to this action that the plaintiff has obtained a verdict in an action of the same kind against another party, although the cause of action in both suits accrued at the same time.^g

2.—*Proof of marriage.*] In order to sustain this action, the plaintiff must prove a marriage in fact; proof of reputation and cohabitation is not sufficient;^h and even the defendant's admission of the fact has been held to be insufficient. As where the defendant was surprised at a lodging with the plaintiff's wife, and on being asked where Major Morris's (the plaintiff) wife was, he answered, "in the next room;" this was held to be insufficient, for it was nothing more than a confession of the reputation that she went by the name of the plaintiff's wife, and not a confession of the fact of marriage.ⁱ There can be no doubt, however, that a distinct and solemn recognition of the marriage made by the defendant is evidence as against him of that fact.^j The plaintiff must prove a marriage in fact. *1457

The fact of marriage is usually proved by producing an examined copy of the register, and some evidence of the marriage may

^a Winter v. Henn, 4 C. & P. 494. (19 Eng. C. L. 491.) B. N. P. 27. Hodges v. Windham, Peake 39. Duberley v. Gunning, 4 T. R. 656.

^b Weedon v. Timbrell, 5 T. R. 357. Bartolot v. Hawker, Peake, 7.

^c Chambers v. Caulfield, 6 East, 244. And see Edwards v. Crock, 4 Esp. 39.

^d B. N. P. 27.

^e Stuart v. the Marquis of Blandford, cited 4 Esp. 17. Wyndham v. Lord Wycombe, *Id.* 16.

^f Bromley v. Wallace, 4 Esp. 237.

^g Gregson v. M^r Taggart, 1 Camp. 415.

^h Morris v. Miller, 4 Burr. 2067.

ⁱ *Id.* B. N. P. 28.

^j See Rigg v. Gurgavern, 2 Wils. 399. 2 Stark. Ev. 261. 2 Phill. Ev. 202.

be proved. identity of the parties. It may also be proved by any person who was present at the celebration of the marriage or by the production of the register, and it is not necessary to call the subscribing witness to the entry in the register; any evidence which will satisfy the jury as to the identity of the parties will be sufficient.^a If the plaintiff be a Quaker, or a Jew, the marriage must be proved to have taken place according to the ceremonies of their respective sects, as they are not included in the marriage acts.^b And as marriages beyond the seas are excepted out of the prohibition in the marriage acts, it must appear that such marriage was performed according to the law of the country where the marriage took place, and evidence of that law must be given by a person of competent knowledge on the subject.^c A marriage between English subjects in the chapel of an English ambassador abroad is valid.^d But a marriage abroad, not celebrated in an ambassador's chapel, nor according to the laws of that country, is invalid.^e A marriage of English minors in Scotland, according to the law of that country is valid, although contracted in contravention to the laws of England, between parties going to Scotland for that purpose.^f So is a marriage, even without a license, by a dissenting minister in Ireland, in a private room.^g

***1458** Having considered what is *prima facie* evidence of marriage heretofore celebrated, it may be observed, that the defendant may rebut the presumption of a legal marriage, arising from such evidence, by showing that the marriage was not legally performed, and therefore void. The first statute of provision on this subject was the 26 Geo. II, c. 23, which enacted, that "all marriages solemnised in any other place than a church or chapel, unless by special license, or without publication of banns, shall be void." This statute was qualified by the 3 Geo. IV, c. 75, and ultimately repealed by the 4 Geo. IV, c. 76, sect 2 of which enacts, that all banns shall be published in some public chapel in which they may be lawfully published, belonging to the parish wherein the persons to be married shall dwell, upon three Sundays preceding the solemnisation of marriage; sect. 6 provides, that no minister shall be obliged to publish banns, unless the persons to be married shall, seven days previously, deliver to him a notice of their true christian names and surnames, and of the houses of their respective abodes, &c.; and by sect. 22, "if any persons shall knowingly

^a 2 Stark. Ev. 505. *Birt v. Barlow*, Doug. 170. B. N. P. 27.
^b 2 Stark. Ev. 508. And see *Horn v. Noel*, 1 Camp. 61. B. N. P. 26. *Deane v. Thomas*, M. & M. 361. (22 Eng. C. L. 333.)

^c *R. v. Brampton*, 10 East, 289. *Lautour v. Teesdale*, 8 Taunt. 830. (4 Eng. C. L. 47.) 2 Stark. 509.

^d 4 G. IV. c. 91, s. 2.

^e *Lacon v. Higgins*, 3 Stark. 183. (14 Eng. C. L. 176.)

^f *Dalrymple v. Dalrymple*, 2 Hagg. 54. B. N. P. 113. *Phillips v. Hunter*, 2 H. 412.

^g *With v. Maxwell*, R & M. 80. (11 Eng. C. L. 390.)

How marriage must be solemnized.

and wilfully intermarry, without due publication of banns, or license, such marriage shall be null and void." It has been held, that if banns be published in the wrong name of the parties, and if there be no evidence to show that they had ever been known by such names, the marriage is null and void.^a But banns published in an assumed name without fraud, will be sufficient, if the parties had previously been known by such name.^b The rule on this subject appears to be, that if the banns be published in names totally different from those which the parties ever used, the marriage will be void, whether the misdescription arose from a mistake or design; but if there be a partial variation only, and it appears not to have proceeded from any fraudulent design, it will be valid.^c

Though the statute *requires* the assent of parents or guardians, to the marriage of minors by license, yet the marriage of minors without such assent will not be on that account void.^d

*Marriages were regulated in England by the foregoing statutes, until by 6 & 7 W. IV, cap. 85 & 86, entitled the Marriage and Registration Acts, explained by 1 Vict. cap. 22, which came into operation on the 1st of July, 1837, new modes of solemnising marriage contracts were introduced. It is not proposed, in this place, to enter more largely into the provisions of these statutes, than merely to state the acts which parties desirous of contracting marriage pursuant thereto are required to do.

*1459

It is observable, in the first place, that these statutes do not interfere with the previous mode of solemnising marriage. Persons desirous of entering into the marriage contract according to the rites of the Church of England, may be so married after publication of banns, or by license, as heretofore.^e Or they may be married according to such rites, without publication of banns, or a license, by producing a certificate from the superintendent registrar of the district, which may be obtained in the following manner.^f—

One of the parties intending to be married, pursuant to the provisions of 6 & 7 W. IV, c. 85, must give notice under his or her hand, to the superintendent registrar of the district (an office appointed under this Act) within which the parties shall have dwelt for not less than seven days then next preceding; or if they dwell in different districts, they must give the like notice to the superintendent registrar of each district.^g The notice must be in the form of a schedule, which the registrar will furnish on being applied to, and must contain a full de-

Mode of celebrating marriage under the marriage and registration acts.

^a Mather v. Ney, 3 M. & S. 905.

^b R. v. Billingham, 3 M. & S. 250. R. v. St. Faiths Newton, 3 D. & R. 348. (16 Eng. C. L. 171.)

^c R. v. Tibshelf, 1 B. & Ad. 195. (20 Eng. C. L. 375.) R. v. Wroxton, 4 B. & Ad. 640. (24 Eng. C. L. 131.)

^d R. v. Birmingham, 8 B. & C. 99. (15 Eng. C. L. 151.)

^e 6 & 7 W. IV. c. 85, s. 1.

^f 6 & 7 W. IV. c. 85, s. 4.

^g *Id.*

scription of the parties, their respective dwelling places, &c., A copy of such notice will be entered by the superintendent registrar in a book called "the marriage notice book," which will be opened at all reasonable times, without fee to all persons desirous of inspecting the same.^a The notice must be read by the superintendent registrar, or by the clerk to the guardians at three weekly meetings of the guardians.^b After the expiration of twenty-one days from the entry of the notice

*1460 "in the marriage book the superintendent registrar may be required by either of the parties, to issue a certificate, if no impediment has been shown."^c

When the parties have thus obtained a certificate, they may be married according to the rites of the church of England,^d or if they object to that form, they may be married at the office of the superintendent registrar in the following manner:—the parties must attend at the office of the superintendent registrar between the hours of eight and twelve in the forenoon of the day appointed, (for the marriage must be solemnised within those hours,) and in the presence of the registrar, and two or more credible witnesses, each of the parties must declare as follows.

"I do solemnly declare, that I know not of any lawful impediment, why I, *A. B.*, may not be joined in matrimony to *C. D.*"

And each of the parties shall say to the other, "I call upon these persons here present, to witness, that I, *A. B.*, do take thee, *C. D.*, to be my lawful wedded wife (or husband)."^e

The registrar will then enter the marriage in the register book, and it must be signed by the parties married, by the superintendent registrar, and by two witnesses.^f

It is observable, that the superintendent registrar may grant a license to marry in a registered building within his district, but not elsewhere. But before he can grant a license, one of the parties must appear personally before him, and make oath that he (or she) believeth that there is not lawful hindrance of the marriage; and the consent of such persons whose consent is required by law has been obtained.^g A marriage, by license may take place at the expiration of seven days after notice of marriage has been entered in the marriage book.^h

Quakers and Jews may solemnise marriage according to the usage of their respective sects, after having obtained a certificate, or license, as above.ⁱ

*1461 Every marriage must be celebrated within three calendar months after the entry of the notice thereof in the marriage book; the notice must be renewed.^j

^a Sec. 5.

^b Sec. 7.

^c Sec. 30, 31.

^d Sec. 11, 12.

^e Sec. 2.

^f Sec. 6.

^g Sec. 1.

^h Sec. 23.

ⁱ Sec. 7.

^j Sec. 15.

Any person authorised so to do, may forbid the issuing of the certificate by the superintendent registrar, whereby the notice of marriage, and all proceedings under it, will be void;^a and the superintendent registrar will be guilty of felony, if he issues a certificate after it is forbidden by any person duly authorised to do so, or if he solemnises marriage contrary to the provisions of this Act.^b A marriage will be null and void, if solemnised under this Act, after three months from the entry of the notice, by the superintendent registrar; or if both parties shall knowingly and wilfully intermarry, in any place, other than the church, chapel, registered building, or office, or other place, specified in the notice and certificate; or without notice to the superintendent; or without a certificate of notice duly issued; or without a license, when it is necessary; or in the absence of the registrar when his presence is necessary.*

3.—*Proof of adultery.*] When the plaintiff has proved the marriage, he should then give evidence of the fact of adultery, which, from its very nature must, in general, be circumstantial. Any evidence which will satisfy a jury that an adulterous intercourse had taken place, will be sufficient. The confession of the wife, however, will not be received in evidence against the defendant.^d

4.—*Damages.*] In aggravation of damages, the evidence of persons who were acquainted with the family, and who had an opportunity of testifying to their demeanor, is admissible to show the terms upon which the plaintiff and his wife had lived.* And with the same view, letters written by the wife to her husband, or to others, previous to any suspicion of criminal intercourse, are admissible.^f Evidence to show the amount of the defendant's *property, is not admissible with a view to damages.^g *1462 Where the wife died after the commencement of the action, but before the trial; it was held, that the jury should give damages to the plaintiff for the loss of the society of his wife, from the time of the discovery of the adultery, till the time of his wife's death.^h The defendant, in mitigation of damages, may show that the plaintiff had carried on an illicit intercourse with other women, and had ill treated his wife;ⁱ and the declarations of the wife, before criminal intercourse, as to the ill treatment of her husband, are admissible with that view.^j So, the defendant may show that the wife had previously eloped

* Sec. 9.

* Sec. 39, 40.

* Sec. 15. 42.

* B. N. P. 28.

* Trelawney v. Coleman, 1 B. & A. 90. 2 Stark. 191. (3 Eng. C. L. 308.)

* Willes v. Bernard, 8 Bing. 376. (21 Eng. C. L. 325.) 2 Stark. Ev. 263.

* James v. Beddington, 6 C. & P. 589. (25 Eng. C. L. 553.)

* Wilton v. Webster, 7 C. & P. 196. (32 Eng. C. L.)

* B. N. P. 27. Bromley v. Wallace, 4 Esp. 237.

* Winter v. Wroot, 1 M. & Rob. 404.

with others, that she was a woman of notorious bad character, and had made the first advances to him.^a

SECTION XIV.

TRESPASS FOR SEDUCTION.

When a father may maintain trespass for the seduction of his daughter.

TRESPASS is the usual remedy for seducing the plaintiff's servant or daughter, *per quod servitium amisit*. This action is principally brought by a parent for debauching his daughter; though it may be also brought by a master for seducing his servant.^b Although loss of service is the ground of the action, yet, when brought by a parent, it is not necessary to prove any contract of service.^c "There is by law," said Littledale, J., "a species of service due from a son or daughter to the parent, which, as to the latter, is the foundation of the action of seduction, and there it is not necessary to prove actual service."^d "If," said the same learned judge, "actual service *were necessary, a duke or a marquis could never bring an action of this kind."^e Yet the mere relation of parent and child, or the expenses incurred in consequence of the daughter's confinement, are not sufficient to sustain this action, without loss of service.^f The slightest evidence of service, however, such as milking the cows, or making tea, is sufficient.^g This action is maintainable though the daughter be of age, if she resides with her father.^h And even where the daughter was married, and living separate from her husband, as servant with her father; it was held, that the latter might maintain this action.ⁱ It is not necessary that the daughter should be actually residing in the father's house at the time of the seduction. Where she was under age, and on a visit with a friend when seduced, it was held, that the father might maintain this action.^j So where the father has two farms, seven miles distant from each other, and the daughter resided at one and acted as mistress of the house there, while the father resided at the other; it was held,

^a 2 Stark. Ev. 254. B. N. P. 28. *Elsam v. Faucett*, 2 Esp. 562.

^b *Fores v. Wilson*, Peake, 55.

^c *Bennett v. Alcott*, 2 T. R. 166.

^d *R. v. Chillesford*, 4 B. & C. 102. (10 Eng. C. L. 281.) *Maunder v. Venn*, M. & M. 324. (22 Eng. C. L. 323.)

^e *In Holloway v. Abell*, 7 C. & P. 529. (32 Eng. C. L.)

^f See *Hall v. Hollander*, 4 B. & C. 660. (10 Eng. C. L. 436.)

^g *Carr v. Clarke*, 2 Chitt. 261. (18 Eng. C. L. 328.) *Bennett v. Alcott*, *supra*. 2 Stark. Ev. 721.

^h *Booth v. Charlton*, 5 East, 47.

ⁱ *Harper v. Luffkin*, 7 B. & C. 387. (14 Eng. C. L. 58.)

^j *Booth v. Charlton*. *Johnson v. M'Adams*, cited in 5 East, 47. But if the daughter had been of age, the action would not lie. *Id.*

that the father might maintain this action.^a But if she was actually in the service of another, and had no intention of returning to her father's house, before she was seduced, the father cannot maintain the action, though she return, while under age, in consequence of the seduction.^b So if a girl were to live with a family, and they chose to maintain her, she being neither a servant nor a temporary visitor, the father could not maintain this action.^c Where, however, the defendant engaged the daughter as a servant, with an intention to seduce her, it was held, that the action would lie.^d This action will lie for seducing an adopted child;^e or at the suit of a relation *with whom the female resided, though her mother be alive.^f Where the father permitted a married man to visit his daughter as a suitor, after having been cautioned; it was held, that he could not maintain an action for seducing her.^g

*1464

The daughter or servant is a competent witness to prove the seduction,^h and though not absolutely necessary to call her as a witness, an omission to do so would be open to great observation.ⁱ The plaintiff cannot give evidence of his daughter's good character and mode of deportment, until it has been impeached on the other side by general evidence of her unchaste conduct.^j If the daughter be asked whether she had not an illicit intercourse with other men previously, she need not answer the question.^k

In aggravation of damages, the plaintiff may give evidence of the conduct and situation of his family at the time;^l and show that the defendant was received in his house as a suitor to his daughter.^m

Though loss of service is the gist of this action, yet in estimating the damages, the jury are not confined to the mere amount of damage from the loss of service; they may allow compensation for the loss which the parent has sustained by being deprived of the society and comfort of his child, and by the dishonor brought upon the family, and also the expenses consequent upon the seduction.ⁿ But it seems that the plaintiff will not be entitled to recover for a physician's fees, unless they have been actually paid; for he is not legally liable to pay them.^o

^a *Holloway v. Abell*, 7 C. & P. 530. (32 Eng. C. L.)

^b *Dean v. Peel*, 5 East, 45.

^c *Per Littledale, J.*, in *Holloway v. Abell*, 7 C. & P. 530. (32 Eng. C. L.)

^d *Speight v. Oliveira*, 2 Stark. 493. (3 Eng. C. L. 445.)

^e *Irwin v. Dearman*, 11 East, 23.

^f *Edmonson v. Machell*, 2 T. R. 4.

^g *Reddie v. Schoolt, Peake*, 240.

^h *Cock v. Wortham*, 2 Stra. 1054.

ⁱ 2 Stark. Ev. 723.

^j *Bamfield v. Massey*, 1 Camp. 460. *Bate v. Hill*, 1 C. & P. 100. (11 Eng. C. L. 339.)

^k *Dodd v. Norris*, 3 Camp. 519. ^l *Bedford v. Mackoul*, 3 Esp. 119.

^m *Elliott v. Nicklin*, 5 Price, 641. 2 Stark. Ev. 722.

ⁿ *Irwin v. Dearman*, 11 East, 23. *Tullidge v. Wade*, 3 Wils. 19.

^o *Dixon v. Bell*, 1 Stark. 287. (2 Eng. C. L. 392.) 5 M. & S. 198.

The defendant may show, under the general issue, that the female seduced was not the plaintiff's servant, for it is the gist of the action.*

* *Holloway v. Abell*, 7 C. & P. 530. (32 Eng. C. L.)

*CHAPTER XXIII.

TROVER.

	PAGE
I. In what cases this action may be maintained.	
II. Absolute property and right of possession.	1467
III. Special property.	1474
IV. Possession alone when sufficient.	1476
V. Conversion.	1477
VI. Demand and refusal.	1482
VII. Of the parties to this action.	1487
VIII. The declaration.	1490
IX. The pleadings.	1492
X. Lien.	1495
XI. Evidence and damages.	1500

SECTION I.

IN WHAT CASES THIS ACTION MAY BE MAINTAINED.

THE action of trover was in its origin an action of trespass ^{Origin of} upon the case for the recovery of damages against a person ^{trover.} who had *found* goods and refused to deliver them on demand to the owner, but converted them to his own use; from which finding (*trouver*) the remedy is called an action of trover. Though originally this action only lay where the defendant had *found* the goods, yet by a fiction of law, it was at length permitted to be brought against any man who, having obtained the possession of goods by any means whatsoever, had wrongfully converted them to his own use.^a The gist of this action is the conversion and deprivation of the plaintiff's property, and not the acquisition of property by the defendant.^b It lies only for *the conversion of *goods* or *personal chattels*. It *1466 does not lie for fixtures *eo nomine*, or for anything annexed to or parcel of the freehold, nor for any injury to real property.^c But it lies for fixtures which may be removed without injury ^{for personal} to the freehold, or which are removable by a tenant.^d ^{al chattels}

So it lies for trees, fixtures, or earth, if after a severance from It lies for

^a 3 Bl. Com. 159. 1 Ch. Pl. 146. B. N. P. 32. But if a person has affirmed the acts of another who wrongfully converted his property, he cannot afterwards treat him as a wrong doer, and maintain trover. *Brewer v. Sparrow*, 7 B. & C. 310. (14 Eng. C. L. 50.)

^b *Per Bayley, J.*, in *Keyworth v. Hill*, 3 B. & A. 685. (5 Eng. C. L. 422.)

^c Bac. Ab. Trover, B. Longstaff *v.* Meagoe, 4 N. & M. 201. (29 Eng. C. L. 60.) *Colegrave v. Dia Santos*, 2 B. & C. 76. (9 Eng. C. L. 30.)

^d *Davis v. Jones*, 2 B. & Ad. 165. *Wandsborough v. Maton*, 2 H. & W. 37. 4 Ad. & Ell. 884. (31 Eng. C. L. 217.)

fixtures
after a se-
verance.

the freehold they have been taken away.^a If a tenant during his tenancy remove a dung heap, and at the time of so doing dig into and remove virgin soil that is beneath it, the landlord may maintain either trespass *de bonis asportatis*, or *trover*, for the removal of the virgin soil.^{b(1)} To sustain this action, the plaintiff must have the right to some specific property; it will not lie for money had and received generally,^c but it may be maintained for so many pieces of gold or silver, and in that case the defendant can only redeem himself by tendering to the plaintiff the same specific pieces.^d It lies for an unstamped agreement, if it can upon payment of a penalty and stamp duty be stamped and rendered available.^e So it lies for a policy of insurance.^f So, for an undivided part of a chattel, as three-fourths of a ship.^g So it lies for a lost bank note, if the defendant has wrongfully converted it to his own use, though he has paid part of the proceeds to the plaintiff; but the payment will go in reduction of the damages.^{h(2)}

Trover
will lie
where
trespass
cannot be
maintain-
ed.

Whenever *trespass* for taking goods will lie, that is, where they are taken wrongfully, *trover* will also lie; for one may *qualify*, but not *increase* a tort.ⁱ But the converse of the proposition does not hold, for *trover* may often be brought where trespass cannot. As where goods are lent or delivered to another to keep, and he refuses to deliver them on demand, *trespass* will not lie, but the proper remedy is *trover*.^j So where the taking is lawful or excusable, trespass cannot be supported, but the owner must bring *trover*; as if a sheriff take goods of a bankrupt in execution, after a secret act of bankruptcy but before the commission is sued out, and sells them, *trover* will lie against him, but not trespass.^k

The general requisites to maintain this action are, that the plaintiff has an absolute or special property in the subject matter, and actual possession or a right to the immediate possession thereof at the time of the conversion; that the subject matter be a personal chattel, and that the defendant has wrongfully converted it to his own use.

^a Com. Dig. Biens, H. Bac. Ab. Trover, B.

^b Higgon v. Mortimer, 6 C. & P. 616. (25 Eng. C. L. 563.)

^c Orton v. Butler, 5 B. & A. 652. (7 Eng. C. L. 224.)

^d Per Abbott, C. J., *id.*

^e Scott v. Jones, 4 Taunt. 865.

^f Harding v. Carter, Park. Ins. 4.

^g Watson v. King, 4 Camp. 272. 1 Stark. 121. (3 Eng. C. L. 393.)

^h Burn v. Morris, 2 C. & M. 579.

ⁱ Bishop v. Montague, Cro. Eliz. 824. 2 Saund. 47, a. Shipwick v. Blanchard, 6 T. R. 298.

^j 2 Saund. 47, p.

^k Cooper v. Chitty, 1 Burr. 20. Balme v. Hutton, 9 Bing. 476. (23 Eng. C. L. 338.) 1 C. & M. 262.

(1) (Moores v. Wait et al. 3 Wend. 104.)

(2) (Though *trover* may lie for a certificate of stock as it does for a bond or deed, yet it will not lie for a certain number of shares of stock claimed by the plaintiff. Sewall v. The Newcastle Bank, 17 Serg. & R. 285.)

SECTION II.

ABSOLUTE PROPERTY AND RIGHT OF POSSESSION.

A PARTY who has an absolute or general property in a chattel, may maintain trover for it, though he has never had actual possession, for it is a rule of law that the *property* of personal chattels draws to it the *possession*. As where *A.* is indebted to *B.*, and *C.* to *A.*, and it is agreed between them that *C.* shall give goods in his possession, which were the goods of *A.*, to *B.*, in satisfaction of *A.*'s debt; if *C.* converts them, *B.* may maintain trover against him; for by the agreement, the right of property was in him, and the conversion is a wrong to him.^a So an executor may declare upon the *possession* of his testator, and of a conversion by the defendant after his death; for the property is vested in the executor, and that draws to it the possession;^b and even if the general owner has had possession and parted with it, if he has not transferred the *right* of possession, he may maintain this action; thus, if he has delivered the goods to a carrier or other bailee, and so parted with the actual possession, he may still maintain trover for a conversion by a stranger, for he retains the possession in law, as ^{*}against a wrong-doer, and the carrier or other bailee is only his servant.^c And if a bailee of goods for a particular purpose transfers them to another in contravention of that purpose, the general owner may maintain trover against that person, though he be a *bonâ fide* vendee, unless in market overt.^d

Absolute property, even without possession, is sufficient.

*1468

And if the owner has parted with the possession of a chattel for a time without a reward, as if he gives a gratuitous permission to use it, the possession constructively remains in him, he has a right to resume it at any time, and therefore may maintain trover against any party guilty of a conversion.^e But to sustain this action, there must exist a right of *possession*, as well as a right of property; therefore where a man let a house and furniture for a term, and the furniture was wrongfully taken in execution pending the term; it was held, that the lessor could not maintain trover, because during the term he had parted with the *right of possession*.^f So the trustees of an estate *pur autre vie* cannot maintain trover for trees felled upon the estate, for the tenant for life has a right to the trees

A right of immediate possession and a right of property must concur.

^a B. N. P. 35. 2 Saund. 47, a.

^b *Id.*

^c *Id.* Gordon v. Harper, 7 T. R. 12.

^d 2 Saund. 47, b. 5th ed. Wilkinson v. King, 2 Camp. 335. Loeschman v. Machin, 2 Stark. 311. (3 Eng. C. L. 359.)

^e Nicholls v. Bastard, 2 C. M. & R. 659. 1 Gale, 295. Hall v. Pickard, 3 Camp. 187. See Lotan v. Cross, 2 Camp. 464.

^f Gordon v. Harper, 7 T. R. 9. 2 Saund. 47, b. Pain v. The Sheriff of Middlesex, R. & M. 99. (21 Eng. C. L. 390.) Benjamin v. The Bank of England, 3 Camp. 417.

when they are cut down.^a Where a father gave his son some property; it was held, that though the son was under age, the father could not maintain trover against a person who had wrongfully converted that property, because the right of possession was not in him, but in his son.^b But where the owner of furniture let it on hire to a married woman who lived apart from her husband, and who was therefore incapable of acquiring a property therein; it was held, that he did not thereby divest himself of the present right of property in such goods, and that he might maintain trover for them.^c

Where in trover for a lease, which the plaintiff declared he was lawfully possessed of as of his own property, the defendant by his plea denied the plaintiff's property; held, that this plea put in issue the right of possession as well as the right of property, and that it was sustained by showing that the defendant had advanced money upon the lease, whereby he acquired an equitable mortgage on it; for it thereby appeared, that though the plaintiff had the right of property in the lease, he had not the right of possession, and that the defendant had a qualified property in it, together with the right of possession.^d

When the owner of stolen property may maintain trover.

*1469

The owner of stolen property, who has prosecuted the thief to conviction, may in general maintain trover for the value of it, against a party who has not purchased it in market overt.^e So he may recover the value in trover from a person who purchased it from the thief by a *bond fide* sale, but not in market overt, and sold it again in market overt before the conviction, notice of the felony having been given whilst they were in his possession.^f

But the owner cannot recover the value of stolen goods from a purchaser in *market overt*, who sold them again *before the thief was convicted*, even though he gave such purchaser notice of the robbery whilst they were in his possession; for the property being altered by the sale in *market overt*, was not re-vested in the owner until the conviction of the felon, but the defendant had parted with the possession before that time, and therefore could not be said to have converted the plaintiff's goods.^g

Stolen horse.

With respect to stolen horses, the property is not altered by a sale in market overt, unless the provisions of 2 P. & M. c. 7, and 31 Eliz. c. 12, are complied with. The regulations are in substance as follows: first, the horse must be exposed openly in the place used for sales for one whole hour, between ten in the morning and sunset, and afterwards brought by both ven-

^a *Blaker v. Ancombe*, 1 N. R. 25.

^b *Hunter v. Westbrook*, 2 C. & P. 578. (12 Eng. C. L. 272.)

^c *Smith v. Plomer*, 15 East, 507. 2 Saund. 47, b.

^d *Owen v. Knight*, Q. B. MS. M. T. 1837.

^e 21 Hen. VIII, c. 11. See *Grimson v. Woodfall*, 2 C. & P. 41. (12 Eng. C. L. 20.)

^f *Peer v. Humphrey*, 1 Harr. & Woll. 38. 2 Ad. & Ell. 495. (29 Eng. C. L. 158.)

^g *Horwood v. Smith*, 2 T. R. 750. See *Parker v. Patrick*, 5 T. R. 175.

dor and vendee to the book-keeper of the fair or market; secondly, toll must be paid, if any due, and if not, one penny to the book-keeper, who shall enter the price, color, and marks of the horse, with the names, additions, and abode of the vendor and vendee; and if the vendor is not known to the book-keeper, the vendor shall bring one credible witness to avouch his knowledge of the vendor, whose name in like manner is to be entered. The property of the owner is not to be taken away by such sale, if within six months after the horse is stolen he puts in his claim before some magistrate where the horse is found, and within forty days more proves such property by the oaths of two witnesses, and tenders to the person in possession of the horse such price as he *bond fide* paid for it in market overt.^a

*The sale of any goods taken wrongfully to any pawnbroker in London, or within two miles thereof, will not alter the property; therefore, if stolen goods are pawned within that limit, the owner may maintain trover against the pawnbroker.^b So where goods are obtained upon false pretences under color of purchasing them, the property is not changed, and the owner may maintain trover.^c *1470

But where the plaintiff exchanged a watch with the defendant for a pair of candlesticks, which the latter warranted to be silver; held, that the plaintiff could not maintain trover for the watch, on proof that the candlesticks were of base metal; for it was a question of warranty, which could not be tried in this form of action.^d

We have already considered in what parties the property in bank notes and other negotiable instruments which have been lost or stolen vests, under what circumstances the right to sue upon such instruments passes to the holder, and when it remains in the loser;^e and when trover will lie for a bill or note;^f we have also shown in what cases the assignees of a bankrupt may maintain this action.^g Lost or stolen bank notes. Assignees of bankrupts.

With regard to the passing of property in the case of a sale of goods, the rule is, that if nothing remains to be done on the part of the seller, as between him and the buyer, before the thing purchased is to be delivered, the property in the goods immediately passes to the buyer, and that, in the price, to the seller; but if any act remains to be done on the part of the seller, then the property does not pass until that act has been done.^h When the property in goods passes by sale. ⁱ "If goods are sold upon credit and nothing is agreed upon as to the time of delivering the goods, the vendee is im-

^a Saund. Pl. Ev. 877.

^b Packer v. Gillies, 2 Camp. 336, n. Peet v. Baxter, 1 Stark. 472. (9 Eng. C. L. 472.)

^c Noble v. Adams, 7 Taunt. 59. (9 Eng. C. L. 25.) Kilby v. Wilson, R. & M. 178. (21 Eng. C. L. 409.) Irving v. Motley, 7 Bing. 543. (90 Eng. C. L. 233.)

^d Emanuel v. Dane, 3 Camp. 299.

^e Ante, 464, et seq.

^f Ante, 499.

^g Ante, 282.

^h Per Holroyd, J., in Tarling v. Baxter, 6 B. & C. 365. (13 Eng. C. L. 199.)

*1471 immediately entitled to possession, and the right of possession and the right of property vests at once in *him; but his right of possession is not absolute, it is liable to be defeated if he becomes insolvent before he obtains possession.”^a Where goods are sold and nothing is said as to the time of the delivery, or time of payment, and every thing that the seller has to do with them is complete, the property vests in the buyer, but he has no right to the possession of the goods until he pays the price.^b

Though a contract for the sale of goods be complete and binding under the statute of frauds, yet the vendee cannot maintain trover for them, if any thing remain to be done on the part of the seller to ascertain the price, quantity, or individuality of the goods, before the delivery; thus, if a portion of a larger quantity be sold, and cannot be ascertained without weighing, or other act separating and distinguishing it from the rest, the purchaser cannot maintain trover until his portion has been set apart.^c But the property in goods passes on a sale by auction, though they are not to be delivered till the king’s duties are paid by the seller.^d

*1472 Where goods are sold upon certain conditions to be performed at the time of the delivery, and the goods are delivered, but the condition not performed, the seller may maintain trover to recover them back.^e So the property which passes by the sale may be divested by rescinding the contract. As where plaintiffs sold goods to T., who paid for them, and was to take them away, but defendant becoming possessed of the place in which the goods were deposited, and being informed of the circumstances, answered, that he would not deliver them to any person whatsoever and the plaintiffs having afterwards repaid the money to T.; it was held, that they might maintain trover against the defendant, as the contract was rescinded, and that this demand and refusal were sufficient *evidence of a conversion to support the action; and that a new demand by the plaintiffs, after they had repaid the money to T., was not necessary.^f

So the property which the vendee has acquired by the sale in the goods may be divested by a stoppage *in transitu*; whenever goods have not been paid for, the vendor, in case of the insolvency of the vendee, may retain them if they remain in his possession;^g or if he has despatched the goods to the vendee, may stop them on their way before they have come into his actual or constructive possession.^h But it has never yet been

^a Per Bayley, J., in *Bloxam v. Sanders*, 4 B. & C. 948. (10 Eng. C. L. 477.) See *Bloxam v. Morley*, 7 D. & R. 407. (10 Eng. C. L. 481.)

^b *Id.*

^c *Busk v. Davis*, 2 M. & S. 397. *Austen v. Craven*, 4 Taunt. 644. *White v. Wilks*, 5 Taunt. 176. (1 Eng. C. L. 64.) *Whitehouse v. Frost*, 12 East, 614. *Wallace v. Breeds*, 13 East, 529. *Simmons v. Swift*, 5 B. & C. 857. (12 Eng. C. L. 388.)

^d *Hinde v. Whitehouse*, 7 East, 558.

^e *Bishop v. Shillito*, 2 B. & A. 329, n.

^f *Pattison v. Robinson*, 5 M. & S. 105.

^g *Bloxam v. Sanders*, *ante*, 1471.

^h Per Bayley, J., *id.* 949. *Lickbarrow v. Mason*, 6 East, 24, n. 1 H. Bl. 357. *Ellis v. Hunt*, 3 T. R. 464. *Bohtlingk v. Inglis*, 3 East, 381.

expressly decided whether a stoppage *in transitu* has the effect of rescinding the contract, and revesting the property in the original owners.^a

In case of a contract respecting a chattel ordered to be made, as to build a carriage or a ship, no property passes until it is finished and delivered to the purchaser, even though the value has been paid; for though while the work is in progress, the manufacturer may intend the chattel for the party who ordered it, still he may afterwards change his intention, and give that chattel to another.^b But "if a ship is built upon a special contract, and it is part of the terms of the contract, that given portions of the price shall be paid according to the progress of the work; part when the keel is laid, part when they are at the light plank; the payment of these instalments appropriates specifically to the purchaser the very ship so in progress, and vests in him a property in that ship."^c Therefore, where *A.* contracted to build a ship for *B.*, and by the terms of the contract, the price was to be paid by instalments at specific periods as the building proceeded, and the work was to be done under the superintendence of a person appointed by *B.*; the instalments *were paid regularly as they became due, and when the ship was finished, *B.* tendered the remaining instalments; held, that the general property in the ship was vested in *B.*, and that he might maintain trover for her; for as by the terms of the contract, the vessel was to be built under the superintendent appointed by *B.*, *A.* could not compel him to accept any vessel not constructed of materials approved by that superintendent; and on the other hand, *B.* could not refuse a vessel which had been so approved; as soon, therefore, as any materials had been approved by the superintendent, and used in the progress of the work, the fabric consisting of such materials was appropriated to the purchaser; and when the fabric of the vessel was complete, the appropriation was complete.^d

A. by direction of *B.* purchases coffee for *B.* which is to be delivered at Leghorn to *B.*'s order; the coffee is accordingly sent to Leghorn, and is sold there by *A.*'s agents and by his direction; *B.* may maintain trover against *A.* for the conversion of the coffee although the price has not been actually tendered to *A.*^e And if *A.* sells corn to *B.*, who buys on speculation, and the corn is landed at the warehouse of *C.*, (the granary keeper of *B.*,) who is told that he is to hold it on the

Of the property in goods ordered to be manufactured.

*1473

^a Per Lord Tenterden, C. J., in *Clay v. Harrison*, 10 B. & C. 106. (21 Eng. C. L. 33.)

^b *Mucklow v. Mangles*, 1 Taunt. 318. *Bishop v. Crawshaw*, 3 B. & C. 419. (10 Eng. C. L. 136.) *Caruthers v. Payne*, 5 Bing. 270. (15 Eng. C. L. 447.) *Goode v. Langley*, 7 B. & C. 26. (14 Eng. C. L. 9.) *Laidler v. Burlinson*, 2 Mees. & Wels. 602. 1 Mur. & Hur. 109.

^c Per Lord Tenterden, C. J. *Woods v. Russell*, 5 B. & A. 946. (7 Eng. C. L. 312.)

^d *Clarke v. Spence*, 1 H. & Woll. 760. 4 Ad. & Ell. 448. (31 Eng. C. L. 107.)

^e *Pyne v. Brander*, 3 Stark. 568. (3 Eng. C. L. 477.)

account of *A.*, *A.* has a sufficient property in it to maintain trover against *C.*^a

Where a contract was put an end to by both parties, but the goods remained in the possession of the intended purchaser; and upon the price rising he converted them to his own use, and offered the former price, which the owner refused, and demanded the increased price, and on refusal held the defendant to bail "for goods sold and delivered;" held, that it did not prevent him from suing in trover.^b

*1474 Where plaintiff being indebted to *J.* shipped goods under a bill of lading addressed to *R.*, with directions to him to sell the goods on plaintiff's account, and place the net proceeds to the credit of *J.*, *R.* having pledged the goods; held, that the plaintiff had a sufficient title to sue in trover, and that the right to the possession of the goods was not in *J.*^c

A gift. The *verbal* gift of a chattel does not pass the property in it to the donee, so as to enable him to maintain trover for it.^d But it is said that the donee may maintain trover for such chattel against a mere wrong-doer.^e

Award. Property does not pass by an award; therefore, where an arbitrator, under a submission of all matters in difference, awarded that *A.* should deliver up a certain specific chattel to *B.* before a certain day, on being paid a certain sum; it was held, that the property in the chattel did not thereby pass to *B.*, so as to enable him to maintain trover for it, though he had tendered the sum awarded to be paid; but if *A.* had accepted the money, it might be otherwise, for it would amount to a ratification of the award, and an assent to the transfer.^f

Title deeds. The owner of an estate may in general maintain trover for the title deeds; for "it is an established principle, that whoever is entitled to the land has also a right to all the title deeds affecting it."^g

SECTION III.

SPECIAL PROPERTY.

Special A PERSON having a special property in goods may maintain

^a Woodley v. Brown, 1 C. & P. 593. (11 Eng. C. L. 486.)

^b Parry v. Dawson, 3 Anst. 710.

^c Selleck v. Smith, 3 Bing. 603. (13 Eng. C. L. 66.)

^d Irons v. Smallpiece, 2 B. & A. 551. ^e 2 Saund. 47, a.

^f Hunter v. Rice, 15 East, 100.

^g Per Lord Tenterden, C. J., Harrington v. Price, 3 B. & Ad. 173. (23 Eng. C. L. 47.) Roberts v. Wyatt, 2 Taunt. 268. Hooper v. Ramsbottom, 6 id. 12. (1 Eng. C. L. 292.) Parry v. Frame, 2 B. & P. 451.

trover against any party who wrongfully converts them.^a Thus a carrier may maintain this action against a stranger who takes the goods out of his possession.^b So may a factor, a warehouseman, a pawnee, a trustee, an agister of cattle, the hirer of goods even for a temporary purpose.^c Churchwardens may maintain trover for the goods of the church taken away either in their own time or in that of their predecessors; for the churchwardens of the preceding year cannot maintain an action after the expiration of their year.^d But they have not such special property in the account books kept by the surveyor of highways as to enable them to maintain trover against a surveyor who has gone out of office and refuses to deliver up the books.^e If a person who has a temporary property in goods delivers them to the general owner for a special purpose, he may, after that purpose is answered, upon demand and refusal, maintain trover for them.^f A sheriff has such special property in goods seized in execution as to enable him to maintain trover for them against a wrong-doer.^g But a landlord has not such special property in goods distrained by him, as to enable him to maintain this action, for he has only a pledge with a power to sell them by statute.^h The party, however, who purchases goods distrained, may maintain trover though the proceedings under the distress be irregular.ⁱ But where a sheriff under a writ of *f. fa.* against *A.*, sold the goods of *B.*; held, that the purchaser was liable to the latter in trover, although he purchased such goods at a public sale directed by the sheriff.^j

property
is sufficient
to maintain
trover.
*1475

A mere servant cannot maintain trover.^k (1) Where a colonel had purchased horses for government, and they being approved of by the proper inspecting officer, were sent under the care of a serjeant to the receiving depôt for his Majesty's use; held, that the colonel had not such a special property as to maintain trover for one of them which was taken out of the possession of the serjeant as a distress for a turnpike-toll.^l

*A person who has only a special property may, in some cases, maintain trover, though he has never had actual possession. Thus, a factor to whom goods have been consigned, property

Possession as a
servant is
not sufficient.

*1476
Special
session. property

^a "A special property may be in one, as in the instance of carriers, while the absolute right to it may exist in another. When a competition arises between those two parties, the right of the latter must prevail; but as against all other persons, a special property is sufficient." Per Lord Kenyon, C. J., in *Webb v. Fox*, 7 T. R. 396.

^b B. N. P. 33. *Arnold v. Jefferson*, 1 Lord Raym. 376.

^c 2 Saund. 47, *b. c. d.* B. N. P. 33. ^d 2 Saund. 47, *c.*

^e *Harrison v. Round*, 2 H. & W. 18. *Nov. Addison v. Round*, 4 Ad. & Ell. 799. (31 Eng. C. L. 184.)

^f *Roberts v. Wyatt*, 2 Taunt. 268. ^g 2 Saund. 47.

^h *Moneaux v. Goreham*, S. N. P. 1362.

ⁱ *Lyon v. Weldon*, 2 Bing. 334. (9 Eng. C. L. 424.)

^j *Farrant v. —*, 3 Stark. 130. (14 Eng. C. L. 166.)

^k *Owen*, 52. ^l *Hopkinson v. Gibson*, 2 Smith, 202.

without
possession
sufficient.

but which he has never received, may bring this action.^a Where *A.* shipped goods at Dundee, by the order of and for *B.* in London, and shortly after the shipment *A.* ascertained that *B.* had stopped payment, and he then indorsed and forwarded the bill of lading to the plaintiff in London, directing him to take possession of the goods and he demanded them from the defendants, who were wharfingers, and in whose custody they were; held, on their refusal to deliver over the goods to the plaintiff, that he had a sufficient title to sue for them in trover.^b

SECTION IV.

POSSESSION ALONE WHEN SUFFICIENT.

Possession alone is sufficient to maintain trover against a wrong-doer.

POSSESSION alone will enable a party to maintain this action against a wrong-doer; for possession is *prima facie* evidence of property.⁽¹⁾ As where a chimney-sweeper's boy found a jewel, and carried it to the shop of the defendant, who was a goldsmith, to know what it was, and delivered it into the hands of his apprentice, who, under the pretence of weighing it, took out the stones, and called to the master to let him know it came to three half-pence, and the master offered the boy the money, but he refused to take it, and insisted on having the thing again, whereupon the apprentice delivered to him back the socket without the stones; in trover against the master, it was ruled—1st. That though the finder of a chattel does not acquire an absolute property therein, yet he has such a property as will enable him to keep it against all but the rightful owner; and consequently he may maintain trover. 2d. That the action will lie against the master, who gave credit to his apprentice and was answerable for his neglect.^d

*1477

*But where the owner of furniture lent it to the plaintiff, under the terms of a written agreement, and he placed it in a house occupied by the wife of *B.*, who afterwards became bankrupt, and his assignees having seized the furniture; held, that the plaintiff might recover in trover, without producing the agreement.^c So where the plaintiff bought and paid for a ship stranded on the English coast, but the transfer was not regular; he tried to save her, but she went to pieces; the defendant possessed himself of parts of the wreck which drifted

^a Fowler v. Down, 1 B. & P. 44. 2 Saund. 47, d.

^b Morison v. Gray, 2 Bing. 260. (9 Eng. C. L. 405.)

^c Blackham's case, 1 Salk. 390.

^d Armory v. Delamirie, 1 Stra. 505.

^e Burton v. Hughes, 2 Bing. 173. (9 Eng. C. L. 368.)

(1) (*Daniel v. Bell*, 11 Wend. 57, n.)

on his farm; held, that the plaintiff's possession enabled him to recover for them in trover.^a An uncertificated bankrupt has a right to goods acquired by him since his bankruptcy, as against all the world but his assignees, and may maintain trover for them against a stranger.^b

The possession of land, sinking a shaft therein, and raising ore, is *prima facie* evidence of a property in all the minerals under the land.^c

SECTION V.

CONVERSION.

THE gist of this action is the wrongful conversion of the plaintiff's property by the defendant. A conversion may consist in a tortious taking of the chattel, or in a wrongful assumption of property in it, or in making an illegal use of it, or in a wrongful detention of it after a demand and refusal. Any wrongful act whereby the defendant deprives the plaintiff of his property, even for a short period, is a conversion; as if *A.* take the horse of *B.* and ride him, and then deliver him to *B.*, it is a conversion.^d If there be a deprivation of property to the plaintiff, it will constitute a conversion, though there be no acquisition of property by the defendant.^e The wearing of a pearl is a conversion.^f

What constitutes a conversion.

*1478

Where a bankrupt was required by his assignees, on his last examination, to deliver to them his books of account which he did; held, that he must be deemed to have delivered them on compulsion; and it being afterwards found that he was not a trader, and that the commission had improperly issued, that he might support an action of trover against such assignees, without any previous demand of the books.^g If goods be wrongfully seized, though they be not removed from the place in which they were, it is a conversion; for the possession is in point of law changed by their being distrained.^h If *A.* wrongfully take goods, and *B.* takes them from *A.*, it is a conversion by *B.*ⁱ But trover will not lie for a chattel which has been taken for the owner's benefit, without an intention to convert

^a Sutton v. Buck, 2 Taunt. 302. See Bassett v. Maynard, Cro. Eliz. 819. 2 Saund. 47, c.

^b Webb v. Fox, 7 T. R. 391.

^c Rowe v. Brenton, 8 B. & C. 737. (15 Eng. C. L. 335.)

^d B. N. P. 46.

^e Keyworth v. Hill, 3 B. & A. 687. (5 Eng. C. L. 422.)

^f Lord Peatre v. Heneage, 12 Mod. 519.

^g Summersett v. Jarvis, 6 Moore, 56. 3 B. & B. 2. (7 Eng. C. L. 392.)

^h Cooper v. Monk, Willes, 52.

ⁱ Wilbraham v. Snow, Sid. 438.

it; as where the defendant took the plaintiff's boat for the purpose of assisting the plaintiff in saving his property, and the boat was sunk, it was held no conversion.^a

Conversion by a bailee. If a bailee deals with goods contrary to the order of the owner, it is a conversion; as if he break open a box entrusted to his care;^b or if he draw part of the liquor out of a vessel, and fill it up with water, it is a conversion of all the liquor.^c(1) But it has been held, in a recent case, that the mere taking away and destroying a part of property which is in the hands of a bailee, who may deliver up the rest, is not a conversion of the whole, so as to enable the owner to maintain trover for the whole.^d Trover will not in general lie against a bailee for having lost goods through negligence, the owner's remedy being an action on the case.^e(2) This action, therefore, will not lie against an innkeeper, for the loss of articles deposited in his house, for the purpose of being forwarded by a carrier.^f

***1479** **The fact of conversion is a question for the jury.** Where a pipe of wine, belonging to the plaintiff, was deposited in the defendant's cellar, and was bottled at a time during which there were conflicting claims to it by the plaintiff and the assignees of the party to whom it was sent, and who resided in the defendant's house; by whom, or by whose orders the wine was bottled did not appear, though there was some evidence that it was likely to be injured from not being bottled; held, that it was a question for the jury, whether the act of bottling operated as a conversion; held also, that it was a question for the jury to say, under all the circumstances, whether the drinking of a part of the wine, taken in connection with the bottling, amounted to a conversion; and they having found that it did not, the court refused to disturb the verdict.^g(3)

Wrongful distress. Trover will lie for goods taken under a wrongful distress; but it will not lie for goods irregularly sold under a distress, the statute 11 G. II, c. 19, s. 19, having declared that no person should be considered as a trespasser *ab initio*, for any thing irregularly done under a distress.^h

Trover will lie a- Trover will lie against a sheriff who takes in execution the goods of a bankrupt, although he sold the goods and paid over

^a Drake v. Shorter, 4 Esp. 165.

^b Baldwin v. Cole, 6 Mod. 919. 2 Saund. 47, a.

^c Richardson v. Atkinson, 1 Stra. 576. See *ante*, 530, as to the liability of carriers, in trover.

^d Per Patteson, J., and Coleridge, J. Philpott v. Kelly, 1 Har. & Woll. 134. 4 N. & M. 671. (30 Eng. C. L. 40.)

^e 2 Saund. 47, *f. ante*, 530.

^f Williams v. Geese, 3 Bing. N. C. 869. (39 Eng. C. L.)

^g Philpott v. Kelley, 3 Ad. & Ell. 106. (30 Eng. C. L. 40.) 1 H. & W. 134.

^h Wallace v. King, 1 H. Bl. 13. Shipwick v. Blanchard, 6 T. R. 296.

(1) If a person hire a horse to go to a certain distance but goes further, he is liable in trover for an unlawful conversion. *Rotch v. Kewes*, 12 Pick. 136.)

(2) (*Pachard v. Getman*, 4 Wend. 613.)

(3) If there is evidence of a conversion, though slight, the jury are the judges of the sufficiency. *Harger v. M'Main's*, 4 Watts, 418.)

the proceeds to the execution creditors, before he had notice of the act of bankruptcy, and before commission issued; for the property vests in the assignees by relation, from the act of bankruptcy, and the sheriff is bound to know whose goods he takes.^a So it lies against a sheriff for seizing, under any execution issued on a *cognovit*, the goods of a person who has petitioned the insolvent debtors' court for relief.^b So it lies against custom-house officers for seizing and carrying to the king's warehouses goods not seizable.^c

*So, where the sheriff under an execution against *A.* seized and sold the furniture in his house, where he lived with a woman to whom he had been married, and to whom the goods belonged before the marriage; it was held, that the woman having afterwards discovered that the marriage was void, *A.* having another wife then living, might maintain trover against the sheriff for the value of the goods, for they were not the goods of *A.*, and the sheriff must at his peril seize the goods of the party against whom the writ issues.^d *1480

A party may be guilty of a conversion by dealing with, or claiming property in goods as his own, or even by asserting the right of another over them; thus, the sale of a ship, (which was afterwards lost at sea,) made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, is a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without showing a demand and refusal.^e And where the hirer of a piano sent it to an auctioneer to be sold; held, that he was guilty of a conversion, as well as the auctioneer, who refused to deliver it up unless the expenses incurred were first paid.^f

So, where a foreign merchant consigned goods to his correspondent in London, who pledged them with a factor as and for his own property, and received the amount in advance, and afterwards became bankrupt; held, that the factor was liable to the foreign merchant in trover for the goods.^g

But where a factor placed goods in the hands of a broker as security for an advance to himself, and with directions to sell, and the goods were sold before any revocation of these directions; it was held, that the principal could not maintain trover

^a *Price v. Helyar*, 4 Bing. 597. (15 Eng. C. L. 87.) *Potter v. Starkie*, cited in 4 M. & S. 260. *Wyatt v. Blades*, 3 Camp. 396. *Carlisle v. Garland*, 7 Bing. 298. (20 Eng. C. L. 136.) *Dillon v. Langley*, 2 B. & Ad. 131. (22 Eng. C. L. 46.) *Balme v. Hutton*, 9 Bing. 471. 1 C. & M. 262. *Jacobs v. Latour*, 5 Bing. 130. (15 Eng. C. L. 388.) *Cooper v. Chitty*, 1 Burr. 20. See *Smith's Leading Cases*, 237.

^b *Groves v. Cowham*, 10 Bing. 5. (25 Eng. C. L. 12.)

^c *Tinkler v. Poole*, 5 Burr. 2567. 3 Wils. 147.

^d *Glasspool v. Young*, 9 B. & C. 696. (17 Eng. C. L. 474.)

^e *Bloxam (Knt.) v. Hubbard*, 5 East, 407.

^f *Loeschman v. Machin*, 2 Stark. 311. (3 Eng. C. L. 359.)

^g *Duclos v. Ryland*, 5 Moore, 518, n. And see *Craven v. Ryder*, 2 Marsh. 127. (1 Eng. C. L. 439.)

against the broker,^a though the latter knew before he sold the goods that the factor was a mere agent, for it was within the scope of the duty of a factor to give authority to sell the goods. So, where a broker who was authorised to sell goods

*1481 "at a certain price, sold them at an inferior price; it was held no conversion.^b

Taking the property of another, by assignment from one who had no authority to dispose of it; as taking an assignment of tobacco in the king's warehouse, by way of pledge from a broker who had purchased it there, in his own name for his principal, and refusing to deliver it to the principal, after notice, and demand by him, is a conversion; for it is an assumption by the assignee of a property in the goods.^c So where goods were shipped at Sunderland, intended to be sent to the plaintiff's agent in London, but by mistake were conveyed to the defendant, who sold part of them, being at that time ignorant of the plaintiff's being interested in them; held, that the sale amounted to a conversion.^d

Where the owner of goods on board a vessel directed the captain not to land them on the wharf, against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, under the idea of the wharfinger's having a lien thereon for the wharfage fees, because the vessel was unloaded against the wharf; held, that the owner upon demand and denial might maintain trover against the captain, unless the latter could establish the wharfinger's right.^e

Conversion by a servant.

If a party wrongfully intermeddle with the property of another, and disposes of it, it is no answer that he acted under the authority of a third person, who had himself no authority to dispose of it; for in a tortious act all are principals and equally liable; therefore, a servant may be charged in trover though the conversion be done by him, however innocently, for the benefit of his master;^f and it is immaterial whether he had his master's authority or not. Where a bankrupt, being indebted to G., delivered goods to G.'s servant, who gave a receipt for them in his master's name, and sold them for his master's use; it was *held a conversion by the servant.^g So where a servant received a bill of exchange from A., making a promise that his master should discount it, which he then delivered to his master, who kept the bill as a security for money due from A. and refused to discount it; held, that the servant was liable to an action of trover for the recovery of the bill.^h

^a *Stierneld v. Holden*, R. & M. 219. (21 Eng. C. L. 422.) 4 B. & C. 5. (10 Eng. C. L. 260.)

^b *Dufresne v. Hutchinson*, 3 Taunt. 117.

^c *M'Combie v. Davies*, 6 East, 538. 2 Smith, 557.

^d *Featherstonehaugh v. Johnston*, 2 Moore, 181. 8 Taunt. 237. (4 Eng. C. L. 86.)

^e *Syeds v. Hay*, 4 T. R. 260.

^f *Stephens v. Elwall*, 4 M. & S. 259.

^g *Perkins v. Smith*, 1 Wils. 398.

^h *Cranch v. White*, 1 Hodges, 61. 1 Bing. N. C. 414. (27 Eng. C. L. 438.)

Proof that the defendant stated that he sold the property in question on the plaintiff's account, is not *prima facie* evidence of a conversion.^a But where the captain of a vessel, on application for a delivery of goods, said he had signed a bill of lading to deliver the goods to another; it was held to be a conversion.^b

Where the drawer of a bill of exchange deposited it with a creditor, giving him authority to receive the proceeds and apply them in a specified way; and the creditor, after an act of bankruptcy by the drawer, gave up the bill to the acceptor and took another in lieu of it; held, a conversion by the creditor for which the assignee of the drawer might maintain trover.^c

SECTION VI.

DEMAND AND REFUSAL.

A DEMAND of the goods by the plaintiff or his agent, and a refusal by the defendant to deliver them, is in general *prima facie* evidence of a conversion. But a refusal on demand does not of itself constitute a conversion, for it may be explained or rebutted by other evidence.^d Whenever the goods have lawfully come into the possession of the plaintiff, as by finding, or bailment, *or delivery by the owner, a demand is necessary in order to maintain this action, unless the plaintiff can prove some wrongful act of the defendant in respect of the goods, which amounts to an actual conversion.^e (1) Where bills of exchange were delivered by a trader, in contemplation of bankruptcy, to a creditor, with a view to a fraudulent preference, and the amount of the bills was received by the creditor after the bankruptcy; it was held, that a demand and refusal to give up the bills before they became due were necessary to enable the assignees to bring trover for them, as the receipt of the amount of the bills by the creditor was not itself a conversion.^f So, where a trader on the eve of his bankruptcy made a collusive sale of his goods to the defendant; it was held, that the assignees could not maintain trover without a demand and refusal;

A demand and refusal are *prima facie* evidence of a conversion.
*1483
When a demand is necessary.

^a English v. Charters, 2 Stark. 30. (3 Eng. C. L. 230.)

^b Thompson v. Trail, 6 B. & C. 36. (13 Eng. C. L. 103.)

^c Robson v. Rolls, 9 Bing. 648. (23 Eng. C. L. 409.) 1 M. & Rob. 239. See Lovell v. Marten, 4 Taunt. 799. Beckwith v. Corral, 3 Bing. 444. (13 Eng. C. L. 44.) Snow v. Leatham, 2 C. & P. 314. (19 Eng. C. L. 142.)

^d Per Parke, B., in Stancliffe v. Hardwick, 2 C. M. & R. 1. 1 Gale, 129.

^e 2 Saund. 47, *e. f. g.*

^f Jones v. Fort, 9 B. & C. 764. (17 Eng. C. L. 493.)

(1) (Bates et al. v. Conkling, 10 Wend. 589. Tompkins v. Haile, 3 Wend. 406.)

for the parties were competent to contract at the time of the sale, and until a demand was made it was uncertain whether the assignees would not affirm the contract.^a But if one buy goods of a bankrupt under such circumstances as will entitle his assignees to maintain trover for them, such buying is in itself a conversion, and the assignees need not adduce evidence of a demand and refusal.^b A demand and refusal are necessary to maintain trover against an excise officer for the detention of goods after payment of the penalty for which the goods were seized; for the officer is not bound to re-deliver the goods.^c

The refusal must be unqualified.

A refusal to deliver up goods on demand, in order to afford evidence of a conversion, must be absolute and unqualified, and not merely evasive;^d and the party refusing must have it in his power at the time to deliver up the goods.^e

Where, on a demand of goods by the real owner, the defendant refused to deliver them, stating as his reason for the refusal, that they had been attached in his hands by a foreign attachment in a suit against a third party, from whom he had received them as his own, which was the fact; held, that there was no *1484 *evidence of a conversion, for the goods were in the custody of the law.^f So where the widow and administratrix of an insolvent, on being applied to by his assignees for some papers that had been in his possession at the time of his decease, answered that they were in the hands of her attorney; held, not sufficient evidence of a conversion.^g

So, where the plaintiff's goods, which had been saved from fire, were carried to a warehouse by the servants of an insurance company, of which the defendant, as one of such servants, kept the key, and on his being applied to by the plaintiff to deliver them up to him, refused to do so without an order from the company; held, that this was not such a refusal as amounted to a conversion.^h So, where the demand of the goods is not made by the party himself, a refusal, on the ground that the party applying is unknown, or not properly authorised, is not a conversion.ⁱ So, if he refuse to deliver them until the claimant shall have proved his right.^j So, where a deed was demanded of the defendant, who said he would not deliver it up, but that it was then in the hands of his attorney; held, not sufficient evidence of conversion.^k

But where *A.* lent goods to *B.*, who died, and on his death

^a *Nixon v. Jenkins*, 2 H. Bl. 135.

^b *Yates v. Carnsew*, 3 C. & P. 99. (14 Eng. C. L. 222.)

^c *Hutchings v. Morris*, 6 B. & C. 464. (13 Eng. C. L. 238.)

^d *Philpott v. Kelly*, 3 Ad. & Ell. 106, (30 Eng. C. L. 40,) *ante*, 1479. *Severn v. Keppell*, 4 Esp. 157.

^e *Smith v. Young*, 1 Camp. 441.

^f *Verrall v. Robinson*, 2 C. M. & R. 495. 4 Dowl. P. C. 242. 1 Gale, 244.

^g *Canot v. Hughes*, 2 Bing. N. C. 448. (39 Eng. C. L. 391.) 1 Hodges, 410.

^h *Alexander v. Southey*, 5 B. & A. 247. (7 Eng. C. L. 85.)

ⁱ *Solomons v. Dawes*, 1 Esp. 83.

^j *Green v. Dunn*, 3 Camp. 215.

^k *Smith v. Young*, *supra*.

the goods came into the possession of C., who, when the goods were demanded of him, said that he should do nothing but what the law required; held, sufficient evidence of a conversion by C.^a So, if a person who has possession of the goods of another, on being desired by the owner to send them to a particular place, not only refuses to send them to that place, but says generally that he will not deliver them up unless payment of a debt due from the owner to him is guaranteed, such general refusal is evidence of a conversion, although he might not be bound to send the goods to any particular place.^b

A bailee cannot be in a better situation than his bailor; *therefore, where the captain of a ship, who had taken goods on freight and claimed to have a lien upon them, delivered them to a bailee; the real owner demanded them of the latter, who refused to deliver them without the direction of the bailor; held, that the bailor not having a lien on the goods, the refusal by the bailee was sufficient evidence of a conversion; "for," said Lord Tenterden, C. J., "if the bailor has no title the bailee can have none, for the bailor can give no better title than he has; the right to the property can therefore be tried in an action against the bailee, and a refusal like that stated in the case has always been considered evidence of a conversion."^c *1485

A demand and refusal are no evidence of a conversion where it is apparent that there has been no conversion; as where the defendant cut down trees and left them in the place where felled; for he cannot be said to have converted the trees if they continue there as before.^d So, where the goods have been lost by a carrier, through negligence, or detained on the ground of a lien.^e But if the party in possession of the goods refuse to deliver them on a different ground, without mentioning his lien, it will be deemed a waiver of the lien, and he cannot afterwards set it up as a defence to the action.^f Where a vendor shipped, by order of the vendee, goods, which by the bill of lading were consigned to a third person at a foreign port; before the vessel sailed, the vendee stopped payment, and the vendor thereupon demanded the goods of the captain, without tendering freight or expenses of unshipping; the captain refused to deliver, solely on the ground that he had signed a bill of lading to another; held, sufficient evidence of a conversion; for the captain by his answer dispensed with any tender of the freight.^g

A demand and refusal may be evidence of a previous conversion. As where an attorney had been possessed of certain deeds of the plaintiff for a considerable time previous to

^a *Davies v. Nicholas*, 7 C. & P. 339. (39 Eng. C. L.)

^b *Sharp v. Pratt*, 3 C. & P. 34. (14 Eng. C. L. 197.)

^c *Wilson v. Anderton*, 1 B. & Ad. 450. (20 Eng. C. L. 496.)

^d *B. N. P. 44.* 2 Saund. 47, c.

^e 2 Saund. 47, f.

^f *Boardman v. Sill*, 1 Camp. 410, n.

^g *Thompson v. Trail*, 9 D. & R. 31. 6 B. & C. 36. (13 Eng. C. L. 103.)

Michaelmas term, and a demand and refusal on the 29th of November was "proved; held, that it was evidence of a conversion prior to *Michaelmas*."^a

By whom the demand should be made. The demand should be made by the person entitled at the time to receive the goods, or his agent duly authorised. If a thing be deposited by one, with the authority of another, and received by the bailee to keep on the joint account of the two, one alone cannot lawfully demand it of the bailee without the authority of the other, so as to maintain trover on the bailee's refusal to deliver it.^b

Of whom and how a demand should be made. The demand, should, in general, be made of the party who is in the possession of the goods, by himself or his agent, or who has the general controlling power over them. A demand may be verbal or in writing, and need not be made upon the defendant personally; a demand in writing, left at his house is sufficient.^c Where the defendant purchased a landau of a bankrupt, and the assignees left a written demand of it at the plaintiff's house; held, that the non-delivery, in pursuance of such demand, was evidence of a conversion in trover by the assignees.^d If a verbal demand and demand in writing are made at the same time, for the purpose of bringing an action of trover, and the one have no reference to the other, evidence of the verbal demand is sufficient, without the production of the writing.^e

No particular form is necessary, provided it be clearly notified to the defendant who the claimant is and what goods are demanded; a demand of payment for goods for which an action of trover is brought, is sufficient.^f But where the plaintiff the vendor of a house, brought trover for various articles which he had left in the house, some of which were fixtures, and he demanded them all as fixtures, and the refusal was, "of the fixtures demanded;" held, that this demand did not enable the plaintiff to recover articles that were not fixtures.^g

^a *Wilton v. Girdlestone*, 5 B. & A. 847. (7 Eng. C. L. 278.)

^b *May v. Harvey*, 13 East, 197.

^c *Logan v. Houlditch*, 1 Esp. 22. But when the demand is not made on the party himself, a reasonable opportunity should be afforded to him to comply with the demand before the action is brought, in order to infer a refusal. *Gibbs v. Stead*, 8 B. & C. 533. (15 Eng. C. L. 288.)

^d *Watkins v. Walley, Gow*. 69. (5 Eng. C. L. 467.)

^e *Smith v. Young*, 1 Camp. 439.

^f *Thompson v. Shirley*, 1 Esp. 31.

^g *Colegrave v. Dias Santos*, 2 B. & C. 76. (9 Eng. C. L. 30.)

*SECTION VII.

PARTIES TO THIS ACTION.

WE have seen that a party in possession of the goods, or having a general absolute property in them, with a right of possession, or having a special property therein, may maintain trover for a tortious conversion of them; we have also considered what constitutes a wrongful conversion; it is now proposed to show against what party this action may be maintained. It is a general rule that all persons who direct or assist in committing an injury to the property of another, are principals and equally liable; trover, therefore, may be brought against any person who was a party to the conversion, though the goods were actually converted by another. As where an execution is delivered by *A.*, to the sheriff, against the goods of *B.*, who at the time has committed an act of bankruptcy, and the sheriff sells the goods and delivers the money to *A.*; the assignees of *B.* may maintain trover against *A.* or the sheriff; for the receipt of the money by *A.* is an adoption of the act of the sheriff, or both jointly.^a So where a bankrupt left some plate with his wife, who delivered it to a servant to sell, and the servant delivered it to the defendant, who pawned it immediately and gave the money to the servant; held, that the defendant was guilty of a conversion, and liable in trover, though he acted merely as a friend.^b

Who may
maintain
trover.

Against
what parties
this
action will
lie.

We have seen that a servant is liable in trover for a conversion, though for the benefit of his master.^c A master, however, is not liable for a conversion by his general servant or agent, unless it be done under his special direction or authority;^d or unless he subsequently assents to the wrongful act, and it appears to be for his use and benefit.^e

*But a principal is liable for a conversion by an agent acting in the course of his employment. Thus, proof of a demand and refusal by the servant of a pawnbroker, is evidence of a conversion by his master.^f So, a sheriff is liable for a conversion by his bailiff.^g *1488

One joint tenant, tenant in common, or coparcener, cannot maintain trover against his companion; for the possession of one is the possession of the others. Thus, where the plaintiff and defendant were members of a friendly society, and the box

Tenants
in common.

^a B. N. P. 41. 2 Saund. 47, m. Nicholl v. Glennie, 1 M. & S. 592. Robson v. Alexander, 1 M. & P. 448, *post*, 1490.

^b B. N. P. 47. Parker v. Godin, 2 Stra. 813.

^c *Ante*, 1481.

^d Pothier v. Dawson, Holt, 384. (3 Eng. C. L. 135.)

^e 4 Inst. 317. Bro. Pl. 133.

^f Jones v. Hart, 2 Salk. 441.

^g See Sanderson v. Baker, 3 Wils. 309. Woodgate v. Knatchbull, 2 T. R. 148. Carlisle v. Garland, 7 Bing. 298. (20 Eng. C. L. 136.)

containing the funds was deposited with the former who gave a bond for the safe custody of it; the defendant took away the box and gave it to a stranger; held, that the plaintiff could not maintain trover against him, for they were tenants in common of the box and its contents.^a But if one joint tenant, &c., *destroy* the thing in common, the other may bring trover; as where one tenant in common of a ship took it away and sent it to India, where it was lost in a storm; it was held to be evidence of a destruction by him, so as to render him liable to an action of trover by his companion.^b(1)

The conversion of a chattel by a tenant in common to its general and profitable application, though it change the form of the substance, is not such a destruction of the subject matter as to prevent the plaintiff from taking and using it in its altered state; therefore, it creates no right of action. Thus, where one tenant in common of a whale refused to deliver a moiety of it to another, and cut it up and expressed the oil; it was held not to amount to a conversion, the parties being tenants in common of the produce just as much as they were of the original chattel.^c It has been held that the mere sale of a ship by one tenant in common is not equivalent to a destruction, so as to subject him to an action of trover.^d

- *1489 But in a recent case, it was laid down by Bayley J., that the sale of the whole of a chattel, by one tenant in common, without the authority of his co-tenant, express or implied, was with respect to the other a wrongful conversion of his undivided part.^e

An undivided property in a chattel, is a sufficient title to maintain trover against a stranger who has wrongfully dealt with it as his own; but a stranger may plead in abatement the nonjoinder of another part owner as co-plaintiff; if he omit to do so, the plaintiff may recover for any injury to his undivided interest, damages co-extensive with that injury.^f

Corporation.

Trover will lie against a corporation for a conversion by their agent in the course of his employment.^g

Husband and wife.

A husband and wife may be joint plaintiffs in this action, where there has been a conversion of *the wife's* goods, either before or during coverture; if the conversion has been during

^a *Holliday v. Camsell*, 1 T. R. 658. Where one tenant in common misuses that which he has in common with another, he is answerable to the other in action as for a *misfeasance*. *Martyn v. Knowllys*, 8 T. R. 146. 2 Saund. 47, A.

^b *Barnardiston v. Chapman*, cited 4 East, 121. B. N. P. 34.

^c *Fennings v. Grenville*, (Lord.) 1 Taunt. 241.

^d *Heath v. Hubbard*, 4 East, 110.

^e *Barton v. Williams*, 5 B. & A. 493. (7 Eng. C. L. 147.) 1 M'Clel. & Y. 406; and see 2 Saund. 47, A. 5th ed. *Stanceliffe v. Hardwicke*, 3 C. M. & R. 1. 1 Gale, 127, post, 1494.

^f Per Parke, B., in *Stanceliffe v. Hardwicke*. *Addison v. Overend*, 6 T. R. 766.

^g *Yarborough v. The Bank of England*, 16 East, 6. *Duncan v. The Proprietors of the Surrey Canal*, 3 Stark. 50. (14 Eng. C. L. 159.)

(1) (*Hyde v. Stone*, 7 Wend. 354. *Gilbert v. Dickerson*, Ibid. 449.)

coverture the husband may sue alone.^a If there has been a conversion by the wife alone, either before or after marriage, or a joint conversion by the husband and wife during coverture, they may be sued jointly.^b Proof of a conversion by the husband alone, will warrant a verdict against himself alone, though it be alleged that they jointly converted the goods to their own use.^c A declaration against husband and wife for converting the plaintiff's goods, is supported by proof of any joint act whereby the plaintiff was deprived of his property.^d

In trover, as in other actions *ex delicto*, several may be joined as defendants, and one or more may be acquitted, and the rest found guilty; but all cannot be found guilty on the same count, without proof of a joint conversion by all. Therefore, where plaintiff brought trover for goods against *A.* and *B.*, bankrupts, and *C.* and *D.*, their assignees, and proved that the bankrupts, before the bankruptcy, were guilty of a wrongful conversion of the goods; and that the assignees, after the bankruptcy, took possession of the goods, and refused to deliver them to the plaintiff on demand, and the jury found all the defendants guilty, there being only one count in the declaration; held, that the evidence did not warrant such finding; for the acts of the bankrupts, and of the assignees, were in themselves distinct, and there was no one joint act of conversion by them all.^e But where *A.* purchased goods of *B.* for *C.*, who gave *A.* his acceptance for their amount; *C.* having become bankrupt, *A.* proved the acceptance under the commission, and afterwards returned the goods to *B.* on which *C.*'s acceptance was destroyed; in an action of trover by the assignees of *C.*; held, that the jury were warranted in finding that *A.* and *B.* had been guilty of a joint conversion.^f

Several
may be
joined as
defend-
ants.

*1490

SECTION VIII.

THE DECLARATION.

THE venue in this action is transitory.

The declaration should state that the plaintiff was possessed of the goods, *as of his own proper goods*, and that they came to the defendant's possession by *finding*. The omission of the former words is, however, immaterial after verdict;^g but fatal

^a 2 Saund. 47, i.

^b *Id.*

^c 2 Stark. Ev. 844. 1 Vent. 24.

^d Keyworth v. Hill, 3 B. & A. 685. (5 Eng. C. L. 423.) B. N. P. 46. 2 Stark. Ev. 845.

^e Nicoll v. Glennie, 1 M. & S. 588.

^f Robson v. Alexander, 1 M. & P. 448.

^g 2 Saund. 47, m. Jones v. Winckworth, Hard. 111. Hudson v. Hudson, Latch. 214.

after judgment by default;^a and the finding is not traversable.^b

Averment of the conversion. As the conversion is the gist of the action, it must also be stated, but the mode of conversion need not be stated; it will be sufficient to aver that the defendant "converted the goods to his own use."^c Though the day of the finding or conversion is immaterial, yet some day and place of conversion must be alleged.^d It is not, however, necessary to prove that the conversion took place in the place alleged in the declaration.^e The chattels should be described with certainty, that the jury may know what is meant; but the same precision and certainty are not required in this action as in detinue, where the thing itself is to be recovered. Thus, trover for a library of books, without stating what they are, has been held sufficient.^f So, for a piece of tape, without saying how many yards. The value of the chattels should also be stated.^g

*1491
Description of the chattel.

How executors and assignees should declare.

When the action is brought by an executor, administrator, or the assignees of a bankrupt, the character in which the parties sue should appear in the declaration. If the plaintiff, in such case, was never in *actual possession* of the goods, he need not allege that he was possessed. As where goods of a testator are taken and converted after his death, and before the executor obtains possession of them; he may declare that the *testator was possessed*, &c., and that the defendant after his death converted them;^h or as the conversion was after the testator's death, he may declare on his own possession as *executor*.ⁱ And if the goods were *taken* in the testator's lifetime, though not *used* until after, the executor may declare of a trover and conversion in the testator's lifetime.^j The same principle applies to assignees of a bankrupt. If they never had *actual possession*, they may declare on the possession of the bankrupt, or on their own *constructive possession*; and in general, it is advisable to insert in the declaration counts in each form. Where the assignees of two partners, bankrupts, declared on the possession of the bankrupts only, and it appeared that the greater part of the goods belonged to one of the partners only, before the commencement of the partnership, and had never been brought to the partnership fund, and that the residue formed part of the joint estate; it was held, that the plaintiffs could recover the residue only; whereas if there had been a count on the possession of the assignees, as it was a joint commission, and the *assignment under such commission passed both joint

^a Swallow v. Ayncliff, S. N. P. 1378.

^b Mills v. Graham, 1 N. R. 140.

^c 1 Ch. Pl. 161.

^d Wilson v. Chambers, Cro. Car. 262. Hubbard's case, Cro. Eliz. 78.

^e Brown v. Hedges, Salk. 290.

^f Elpicke v. Acton, 1 Vent. 114. 2 Saund. 74, a.

^g Radley v. Rudge, 2 Stra. 738.

^h 2 Ch. Pl. 596. Per Curiam, 4 B. & A. 271. (6 Eng. C. L. 422.)

ⁱ Hudson v. Hudson, Latch. 214. 2 Saund. 47, a.

^j Id. Jenkins v. Plombe, 6 Mod. 182.

Crossier v. Ogleby, 1 Stra. 60. 2 Saund. 47, n.

and separate effects, the whole might have been recovered, and there would not have been any misjoinder, since the plaintiffs would have described themselves as assignees of both partners in the count on their own possession, which they might well do, though the property was separate, the commission being joint.^a

Assignees, however, under a joint commission, when suing for a separate demand, need only describe themselves as assignees of those bankrupts for whose separate demands they sue.^b But where the commissioners are separate, and the same persons appointed assignees under each, though they may declare for a joint demand due to all or any number of the bankrupts, describing themselves as assignees of those bankrupts, yet they cannot declare in the same declaration for separate demands due to each bankrupt, nor for joint demands, and also separate demands.^c

A declaration by husband and wife must not allege a possession *in them both*, nor state the damage to have accrued to them *both*; for the possession of the wife is the possession of the husband, and the property vests in him exclusively, consequently, the conversion cannot be to the *damage of the wife*, but of the husband.^d In trover against husband and wife, if the declaration state that they converted the goods to *their own use*, it will be sufficient after verdict; for a conversion does not necessarily imply an acquisition of property.^e

Husband
and wife.

SECTION IX.

THE PLEADINGS.

By Reg. Gen. Hil. T. 4 W. IV, reg. 4, "the plea of not guilty, in actions on the case, shall operate only as a denial of the *breach of duty or wrongful act alleged to have been committed by the defendant." The rule then mentions the following example as applicable to trover. "In an action for converting the plaintiff's goods, the plea of not guilty shall operate as a denial of the conversion only, and not the plaintiff's title to the goods." *1493

The conversion which is put in issue by a plea of not guilty, Not guilty

^a Cock v. Tuno, S. N. P. 1793. 2 Saund. 47, n. 5th ed.

^b Scott v. Franklin, 15 East, 428. Harvey v. Morgan, 2 Stark. 17. (3 Eng. C. L. 222.) Stonehouse v. De Silva, 3 Camp. 399.

^c Hancock v. Haywood, 3 T. R. 433. Sheatfield v. Halliday, *id.* 779. Scott v. Franklin, *supra*. See a very elaborate note on this subject in 2 Saund. 47, o. 5th ed.

^d Nelthorpe v. Anderson, 1 Salk. 114. Draper v. Fulkes, 1 Yelv. 165. 2 Saund. 47, i.

^e Keyworth v. Hill, 3 B. & A. 685. (5 Eng. C. L. 422.)

puts in issue a conversion in fact only.

This plea admits a property in the plaintiff, but to the extent necessary to maintain the action only. The defendant may show under it any thing not inconsistent with that admission, if there has been no actual conversion.

is a conversion in *fact*, and not merely a wrongful conversion; and where there has been a conversion in *fact*, and the defendant insists that such conversion was lawful, he must since the new rules confess and avoid it, by pleading specially the right and title by virtue of which he converted it;^a therefore it has been held, that the defendant could not show under a plea of not guilty that he and the plaintiff were joint-tenants of the chattel in question; to avail himself of that defence he should confess and avoid the conversion by pleading specially the title by which he did it.^b But where there has been no *actual* conversion, but merely a demand and refusal, which are only evidence of a conversion, the defendant may show under a plea of not guilty that he was tenant in common with the plaintiff, or was otherwise entitled to retain the goods; and it seems that in such case he may even show that he had a lien on them: for the plea of not guilty admits only that the plaintiff had some property or right of possession, as between him and the defendant, and the latter may give in evidence any defence consistent with that admission, though he cannot be allowed to go into a case which is contradictory to it; he may therefore show that he himself had a similar interest with the plaintiff, for that is perfectly consistent with such admission.^c

But he cannot give evidence to show that the plaintiff was the finder of the goods, and that he himself was the real owner; nor that the sole property was in another, by whose directions he did the act complained of; for that would be inconsistent with his admission; he may however prove, to rebut a *prima facie* case of conversion, that another has the same interest with the plaintiff, and that he lawfully acted by the authority of that other.^d

*1494

The facts of the case in which the preceding positions have been laid down, were these: the plaintiff and defendant were partners as carriers, they agreed to set up a wagon in common, and each party was to supply horses; on the dissolution of the partnership, the defendant seized and sold two horses supplied by the plaintiff, for the purpose of paying partnership debts; in trover for the seizure, it was held, that he could not give evidence of these facts under a plea of not guilty; but that, since there was an *actual* conversion, they should be pleaded in confession and avoidance.^e

Where in trover for horses, the defendant pleaded, 1st, that they were not the property of the plaintiff; 2dly, that the defendant (a sheriff's officer) seized them under an execution against *F.*, whose property they were; to which the plaintiff replied that they were his own property, *modo et forma*; held, that the issue raised by the defendant was, whether the cattle

^a Per Parke, B., in *Stancilffe v. Hardwick*, 2 C. M. & R. 4. 1 Gale, 130.

^b *Id.*

^c *Id.*

^d Per Parke, B., *id.*

^e *Stancilffe v. Hardwick*, 2 C. M. & R. 1. 1 Gale, 137.

were the *sole* property of *F.*, and the jury, at the trial, having found that they were the joint property of the plaintiff and *F.*, the plaintiff was entitled to recover.^a

In trover for a bill of exchange, defendant pleaded that before the conversion, *A.* was lawfully possessed of the bill, and that he indorsed it to *B.*, and that *B.*, for a valuable consideration, indorsed it to the defendant. The replication took issue upon the averment of consideration, which was found for the plaintiff; held, that by this plea the title of the plaintiff was admitted, and that the defendant was not entitled to arrest the judgment, upon the ground that the title appeared to be in *A.*; held, also, that defendant was not entitled to a repleader; for the facts alleged in the plea might be perfectly true, and yet the property in the bill remain unaltered in the plaintiff. As if the plaintiff had lost the bill, or had delivered it to *A.* for a special purpose; in neither of which cases could the title of a third person be set up against that of the plaintiff.^b A plea that "the chattel in question was the property of the defendant, and that he delivered them to *R.*, who delivered them to the plaintiff, whereupon the defendant took it from the plaintiff, which was the conversion complained of, has been held good on special demurrer."^c

*1495

Where the plaintiff in trover claimed under a sale, it was held, that the defendant, under a plea that the goods were not the plaintiff's property, could not show the sale to have been fraudulent. The fraud must be pleaded.^d

SECTION X.

LIEN.

If the defence be that the defendant has a lien on the goods in question, it should be specially pleaded; though it seems, that if there has been no conversion in fact, but a demand and a refusal, only, a lien may be given in evidence under the general issue.^e The safer course, however, is to plead it specially. A lien should be specially pleaded.

A lien may be created by custom, agreement, or operation of law, and is either general or particular. A general lien, is a lien. General

^a Farrar v. Beswick, 1 Mees. & W. 682. 2 Gale, 153.

^b Fancourt v. Bull; 1 Hodges, 98. 1 Bing. N. C. 681. (37 Eng. C. L. 542.)

^c Morant v. Sign, 2 Mees. & Wels. 95. 5 Dowl. 319.

^d Howell v. White, 1 M. & Rob. 400.

^e Stancliffe v. Hardwicke, ante, 1494. The Court of Common Pleas allowed in one case four special pleas of lien, each varying the description of lien, to be pleaded along with the general issue. Leuchart v. Cooper, 1 Bing. N. C. 509. (37 Eng. C. L. 476.) 1 Hodges, 16.

right to retain, for a general balance of account; and its existence may be proved by evidence of an express agreement, or mode of dealing, between the parties, or by the general usage among persons engaged in the same line of business. It has been established by numerous decisions, that the following classes of persons have a general lien. Attorneys,^a bankers,^b brokers,^c calico-printers,^d factors,^e fullers, in some places,^f packers,^g wharfingers.^h But common carriers,ⁱ innkeepers,^j millers,^k printers,^l have not a general lien. Whether dyers have a general lien, is unsettled, there being conflicting decisions on the subject.^m

**Particular
lien.**

A tradesman has a lien upon a particular chattel delivered to him in the course of his business, for the amount of his charge, in respect of labor bestowed on that particular chattel, or expense incurred in the execution of the purpose for which the chattel was entrusted to him. Thus, a tailor has a lien upon cloth delivered to him to be made up;ⁿ a carrier has a lien for the carriage upon goods entrusted to him to be delivered;^o a master of a vessel upon the luggage of passengers;^p an innkeeper on the goods of his guest, for his bill,^q so upon horses in his stable, for their keep.^r So a trainer has a lien for his charge in training and keeping horses.^s But a livery stable keeper has no lien on the horses in his stable, without an express agreement.^t Commissioners for taking acknowledgments of married women, have a lien for their fees on the deed, certificate of execution, &c.^u An owner, who remains in possession of a ship, has a lien on the goods on board belonging to the charterer, for the freight due under the charterparty.^v But

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- ^a *Stevenson v. Blakelock*, 1 M. & S. 535. *Ex parte Pemberton*, 18 Ves. 382.
 - ^b *Scott v. Franklin*, 15 East, 428. *Bolland v. Bygrave*, R. & M. 271. (21 Eng. C. L. 436.)
 - ^c *Maanes v. Henderson*, 1 East, 335. *Mann v. Forrester*, 4 Camp. 60.
 - ^d *Weldon v. Gould*, 3 Esp. 268.
 - ^e *Kruger v. Wilcox*, Amb. 252. 6 T. R. 262. *Kinlock v. Craig*, 3 T. R. 119.
 - ^f *Sweet v. Pym*, 1 East, 4. But see *Cumpston v. Haigh*, 1 Hodges, 374. 2 Bing. N. C. 449. (29 Eng. C. L. 391.)
 - ^g *Ex parte Deeze*, 1 Atk. 228. *Green v. Farmer*, 1 Bl. 651. 4 Burr. 2222.
 - ^h *Naylor v. Mangles*, 1 Esp. 109. *Spears v. Hartley*, 3 Esp. 81.
 - ⁱ *Openheim v. Russell*, 2 B. & P. 42. *Kirkman v. Shawcross*, 6 T. R. 14.
 - ^j *Jones v. Thurlow*, 8 Mod. 172.
 - ^k *Ex parte Ockenden*, 1 Atk. 238. 5 M. & S. 180.
 - ^l *Blake v. Nicholson*, 3 M. & S. 167.
 - ^m *Rose v. Hart*, 8 Taunt. 499. (4 Eng. C. L. 185.) *Bennett v. Johnson*, 2 Ch. 455.
 - ⁿ *Hussey v. Christie*, 9 East, 433. ^o *Skinner v. Upshaw*, Lord Raym. 752.
 - ^p *Wolfe v. Summers*, 2 Camp. 201.
 - ^q *Naylor v. Mangles*, 1 Esp. 109. *Thompson v. Lacy*, 3 B. & A. 283. (5 Eng. C. L. 285.)
 - ^r *Johnston v. Hill*, 3 Stark. 172. (14 Eng. C. L. 176.) *Yorke v. Grenagh*, Lord Raym. 866.
 - ^s *Bevan v. Walters*, M. & M. 236. (22 Eng. C. L. 301.)
 - ^t *Johnson v. Etheridge*, 1 C. & M. 743. *Wallace v. Woodgate*, R. & M. 194. (21 Eng. C. L. 414.)
 - ^u *Ex parte Grove*, 3 Bing. N. C. 304. (32 Eng. C. L.)
 - ^v *Campion v. Golvin*, 2 Hodges, 116.

where a mortgage deed was delivered to *A.*, an auctioneer, for the purpose of obtaining payment of the principal and interest due thereon from the mortgagor, and *A.* made several applications for that purpose; held, that *A.* had no lien on *the deed in respect of the charge for making those applications.* *1497

The vendor of goods has a lien on them for the price;^b Sale. unless they are sold upon credit, in which case he has no lien.* But a man who finds the property of another, which has been lost or mislaid, and voluntarily puts himself to trouble or expense to preserve it, and to find the owner has not a lien Lost property. upon it for the recompense which he may reasonably deserve.^d If *A.* repairs and expends labor upon a chattel, without the authority of the owner, he has no lien on it for such repairs as against the owner.*

The party claiming a lien, must have possession of the goods, and if he obtains possession by fraud or misrepresentation, he cannot enforce his claim of lien, though, if the goods had come rightfully into his possession, he might have retained them.^f Possession by fraud.

By statute 6 G. IV, c. 94, s. 2, any person entrusted and in possession of any bill of lading, India warrant, dock warrant, order for delivery of goods, &c., shall be taken to be the true owner of such goods, &c., so far as to give validity to any agreement for the sale, deposit, or pledge thereof, as a security for money, &c., provided the person advancing money, &c., on the security thereof, &c., shall not have notice that the person in possession of such documents is not the actual and *bond fide* owner of the goods, &c. And sec. 5 enacts, that any person may take such documents in pledge, though he has notice that the holder is a factor or agent; but that he shall have no farther right in the said goods or documents than the factor or agent had at the time of the deposit. It was determined, under the former section, that a person receiving India warrants in pledge, from a factor, was not entitled to retain them against the true owner; if, applying his understanding to the circumstances, and exercising due diligence, he might know that the *goods were not the property of the factor.*^e It has been held, under section 5, that where a broker accepted bills on his principal, on the security of goods then in his hands, and pledged the goods with a person who had notice of the agency, the broker could only transfer such right as he had, which was Factors' Act.

Decisions under the preceding Act.

*1498

^a *Nanderson v. Bell*, 2 C. & M. 304.

^b *Townley v. Crump*, 1 H. & W. 564. 4 Ad. & Ell. 58, (31 Eng. C. L. 23,) *post*, 1499.

^c *Crawshaw v. Humfray*, 4 B. & A. 50. (6 Eng. C. L. 344.)

^d *Nicholson v. Chapman*, 2 H. Bl. 254. *Bucks v. Bristead*, 2 Bl. 1171.

^e *Hiscox v. Greenwood*, 4 Esp. 174. *Buxton v. Bangham*, 7 C. & P. 674. (32 Eng. C. L.)

^f *Taylor v. Robinson*, 8 Taunt. 648. (4 Eng. C. L. 238.) *Lempriere v. Pasley*, 2 T. R. 485. *Madden v. Kempster*, 1 Camp. 12.

^g *Evans v. Trueman*, 1 M. & Rob. 10.

a right to be indemnified against the bills which he accepted and that the principal having satisfied those bills, was entitled to have back his goods from the pawnee, without paying the amount for which they were pledged.^a

Where *A.*, a factor, accepted a bill of exchange for *B.*, on an engagement by the latter to consign goods to him for sale: and *B.*, in fraud of his engagement, subsequently consigned the goods to *C.*, who, without the knowledge or concurrence of *B.*, and without having made any advances on the goods himself, transferred the bill of lading to *A.*, with directions to sell the goods for the benefit of *B.*; held, that *A.* did not thereby acquire a lien on the goods for the amount of his acceptance, and that he could not maintain trover against a creditor of *B.*, who seized the goods under a foreign attachment.^b

Waiver of lien. A party waives his right of lien, if upon being applied to to deliver up the goods, he claims to retain them on a different ground than that upon which he rests his claim of lien.^c So where *A.* having repaired a carriage for *B.*, allowed him to take it away from time to time; held, that he could not afterwards detain it for the amount of repairs, nor upon a claim for standage without an express contract to pay for standage, unless the owner left it upon the premises beyond a reasonable time after notice.^d

But a person does not waive his lien by the mere fact of his omitting to state that he claims to retain the goods in *that right* when they are demanded; nor is it sufficient evidence of a waiver of his lien, that he bought these goods with others, which he also refused to deliver up, although he had no lien on ^{*1499} them, the same as to the whole being void. Therefore, where the defendant had a lien on cloths purchased from a trader, after an act of bankruptcy, and on their being demanded by the assignees, refused to give them up, saying "he might as well give up every transaction of his life;" held, that this was no waiver of his lien, and that it was not merged in the purchase.^e

A lien is divested by a complete delivery. A party waives his lien by parting with the possession. So if a party takes the goods in execution at his own suit, he waives his lien.^f So, goods are divested of a lien by a complete delivery, which is a question for the jury. Where several goods belonging to one owner, are carried the same voyage, a delivery of part does not defeat the lien upon the remainder for the whole freight.^g But where the plaintiff sold timber to

^a Fletcher v. Heath, 7 B. & C. 517. (14 Eng. C. L. 94.)

^b Bruce v. Wait, MS. *Coram* Tindal, C. J., Sum. Ass. 1837. A rule to set aside a nonsuit afterwards refused by the Court of Exchequer.

^c Boardman v. Gill, 1 Camp. 410, *n.*

^d Hartley v. Hitchcock, 1 Stark. 408. (2 Eng. C. L. 447.)

^e White v. Gainer, 9 Moore, 41. 2 Bing. 23. (9 Eng. C. L. 302.)

^f Jacobs v. Latour, 5 Bing. 130. (15 Eng. C. L. 388.)

^g Bernal v. Pim, 1 Gale, 17.

B. felled on land occupied by *A.*, at so much per foot, and the timber was measured; and *B.* carried away part of the trees, and marked the remainder; held, that the plaintiff had no lien on the remaining part for the price of the whole, for the delivery was complete.^a By the custom of trade in Liverpool the transfer of a delivery order from the vendor to the vendee of the goods enables the latter to go into the market and dispose of such goods. Where the vendee had thus disposed of part which had been delivered according to his order, and he then became bankrupt, the rest of the goods remaining in the warehouse of the vendor; held, that the latter was entitled to retain them; the giving of the delivery order not operating as between the original vendor and vendee as a complete transfer of the goods.^b If goods upon which a party has a lien are taken away by undue means, the lien revives on his recovering possession of them.^c

A lien is not destroyed, though the demand out of which it arises is barred by the statute of limitations.^d If a party who has a lien on a chattel abuses it, or wrongfully parts with it, *the owner's right thereto is revived, and he may maintain *1500 trover for it against the holder.^e

SECTION XI.

EVIDENCE AND DAMAGES.

THE evidence in this action must depend upon the issue raised by the pleadings. Under a plea of not guilty the plaintiff will be required to prove only a conversion in fact, and the value of the goods.

Where a party who was employed by the plaintiff to discount a bill misapplied it in discharge of a debt of his own; held, that he was a competent witness for the plaintiff in trover against the party to whom it was wrongfully transferred, for he stood indifferent between the parties.^f Where a demand of the goods in question was made under the authority of a power of attorney, which was not disputed; held, that it need not be produced.^g

To support a plea of the statute of limitations in trover, by showing a conversion more than six years before action

^a *Tansley v. Turner*, 1 Hodges, 267.

^b *Townley v. Crump*, 1 Harr. & Woll. 564. 4 Ad. & Ell. 58. (31 Eng. C. L. 23.)

^c *Wallace v. Woodgate*, 1 C. & P. 575. (11 Eng. C. L. 477.) R. & M. 193. (31 Eng. C. L. 414.)

^d *Spears v. Harley*, 4 Esp. 81.

^e *Scott v. Newington*, 1 M. & Rob. 252.

^f *Fancourt v. Bull*, 1 Bing. N. C. 681. (27 Eng. C. L. 542.) 1 Hodges, 98.

^g *Leuchart v. Cooper*, 7 C. & P. 119. (32 Eng. C. L.)

brought, the defendant must either prove an actual conversion in fact, or give evidence of a positive and absolute demand and refusal before that period.^a

The damages to be recovered is the value of the property at the time of the conversion.

*1501

Damages.

With respect to the damages to be recovered in this action, the general rule is, that the value of the property at the time of the conversion,^b or at any subsequent time, may be awarded by the jury at their discretion.^c(1) If the goods have been returned to the plaintiff the practice is, in ordinary actions of trover, to give merely nominal damages; but if an actual damage has been sustained, which was the necessary consequence of the conversion; as if the action be for riding the plaintiff's horse, damages may be recovered notwithstanding the chattel is returned.^d

Where the goods had been delivered to the plaintiff and accepted by him unconditionally after the action had been commenced; it was held, that he could not recover more than nominal damages, particularly as no special damage was alleged in the declaration, and the damages sought to be recovered were not the necessary consequence of the conversion; for the plaintiff was not bound to accept the goods, he might have proceeded with his action.^e In trover for a bank note, the acceptance of part of the produce does not affirm the taking so as to waive the tort, but the amount received will go in reduction of damages.^f In trover against a sheriff for a wrongful sale, the jury may deduct, in their estimate of damages, the expenses of the sale;^g but in estimating the damages the jury are not bound by the sum at which the goods sold, they may allow what they consider to be the real value of the goods.^h

Where the defendant lent money at usurious interest to the

^a *Philpott v. Kelley*, 4 Nev. & M. 611. 3 Adol. & Ellis, 106. (30 Eng. C. L. 40.) 1 Har. & Woll. 134.

^b *Mercer v. Jones*, 3 Camp. 477. *Davis v. Oswell*, 7 C. & P. 804. (32 Eng. C. L.)

^c *Greening v. Wilkindon*, 1 C. & P. 625. (11 Eng. C. L. 490.) By 3 & 4 W. IV, c. 42, s. 29, the jury may give damages in the nature of interest over and above the value of the goods at the time of the conversion.

^d Per Tindal, C. J., in *Moon v. Raphael*, 2 Bing. N. C. 310. (29 Eng. C. L. 347.) 1 Hodges, 293. *Quære*, whether special damage should be alleged in the declaration, to enable the plaintiff to recover it. *Id.* In *Davis v. Oswell*, *supra*, Parke, B., held, that if special damage be laid in the declaration, the plaintiff may recover it, together with the value of the chattel in question.

^e *Moon v. Raphael*, *supra*. See *Sydes v. Hay*, 4 T. R. 260. *Sippora v. Bassett*, 12 Vin. Ab. tit. Ev.

^f *Burn v. Morris*, 2 C. & M. 579.

^g *Clarke v. Nicholson*, 1 C. M. & R. 724. 1 Gale, 21.

^h *Classpoole v. Young*, 9 B. & C. 696. (17 Eng. C. L. 474.) See *Whitehouse v. Atkinson*, 3 C. & P. 344. (14 Eng. C. L. 339.)

(1) (The value of the goods is the ordinary measure of damages, but the jury may go beyond it. *Harger v. M'Maine*, 4 Watts, 418. Where the action is for bonds, the measure is the amount which may be recovered on them. *Romig v. Romig*, 2 Rawle, 241. In trover for a promissory note, the jury are not confined to the principal of the note with interest, but may give damages beyond this, where there has been an outrage in the taking or vexation or oppression in the detention. *Taylor v. Morgan*, 3 Watts, 333.)

plaintiff; to color the transaction, a sale of goods for the amount of the money lent was made by plaintiff to defendant, and the goods were transferred; it was agreed that they should be re-sold to plaintiff at a higher price, if a bill drawn by defendant on plaintiff for the re-purchase money, should be dishonored; the bill was dishonored, and the defendant retained the goods; held, that the plaintiff might recover in trover for the full value of them, without deducting the money advanced on the first pretended sale.^a

*The court will, in some cases, stay the proceedings on the restoration of the chattel in question and payment of costs. *1502
But if the value of the article be not ascertained, or if the plaintiff claims special damage, the court will not interfere.^b

In trover for a packet of letters, the defendant was allowed to stay proceedings, as to one of the letters, upon delivering it up and paying costs.^c

^a *Hargreaves v. Hutchinson*, 2 Adol. & Ellis, 19. (29 Eng. C. L. 13.) 4 Nev. & M. 11.

^b *Tucker v. Wright*, 3 Bing. 601. (13 Eng. C. L. 64.) *Gibson v. Humphrey*, 1 C. & M. 544. *Mackinson v. Rawlinson*, 9 Price, 460. *Whitten v. Fuller*, 2 Bl. 902. *Olivant v. Berino*, 1 Wils.

^c *Earle v. Holderness*, 4 Bing. 462. (15 Eng. C. L. 41.) 1 M. & P. 254. And see *Brunsdon v. Austen*, 1 Tidd's Prac. 571. B. N. P. 49. *Fisher v. Prime*, 3 Burr. 1363.

*CHAPTER XXIV.

WARRANTY OF HORSES.

THE nature and effect of a warranty on the sale of goods in general having been considered in former parts of this work,^a the following observations will be confined to a warranty on the sale of horses.

Remedy
for a
breach of
warranty.

If a horse, upon being sold, is warranted sound, or as possessing any particular quality, as quiet to ride or drive, and afterwards proves to be unsound, or devoid of such quality, the purchaser may maintain an action of assumpsit or on the case upon the warranty against the seller; the former is, however, the more usual, and a preferable remedy.^b To maintain this action there must be an *express* warranty or fraud on the part of the seller. No price, however high, will imply a warranty.^c

Construction of
warranties

No particular form of words is necessary to constitute a warranty; the general rule is that whatever the vendor represents at the time of the sale is a warranty.⁽¹⁾ An assertion by the vendor of a horse, in the course of conversation and dealing, and before the bargain was complete, that the vendee might depend upon it that the horse "was perfectly quiet and free from vice," is a warranty to that effect.^d And where the vendor at the time of the sale said, "I never warrant, but he is sound as far as I know;" held, to be a qualified warranty on which the purchaser might maintain an action, if he could show that the horse was unsound to the knowledge of the vendor.^e Where there was a written warranty in these terms, "to be sold, a horse five years old;—has been constantly driven in the plough—warranted;" held, that the warranty applied to the soundness only.^f So, where the contract was in these words, "Received of Mr. B. 10*l*. for a grey four year old colt, warranted sound in every respect;" held, that the warranty was restricted to the soundness, the age being matter of description or representation only, by which, in the absence of fraud, the seller was not bound;^g and where the vendor not knowing the age of the horse, but having a written pedigree,

^a See *ante*, 95. 1077.

^b *Williamson v. Allison*, 2 East, 446.

^c *Parkinson v. Lee*, 2 East, 322. *Le Neuville v. Nourse*, 3 Camp. 351.

^d *Cave v. Coleman*, 3 M. & R. 2.

^e *Wood v. Smith*, 5 M. & R. 124. 4 C. & P. 45. (19 Eng. C. L. 267.)

^f *Richardson v. Brown*, 1 Bing. 344. (8 Eng. C. L. 339.)

^g *Budd v. Fairmann*, 8 Bing. 48. (21 Eng. C. L. 217.) 5 C. & P. 78. (24 Eng. C. L. 221.) *Geddes v. Pennington*, 5 Dow. 164. *Buchanan v. Parnshaw*, 2 T. R. 745.

(1) (Whether what was said amounted to a representation of soundness, or to a mere expression of an opinion, belongs to the jury to determine. *Whitney v. Sutton*, 10 Wend. 411.)

which he received with him, sold him as a horse of the age stated in the pedigree, observing at the same time that it was his only source of information; held, not to amount to a warranty.⁽¹⁾

A general warranty will not extend to guard against defects which are manifest and visible to the senses of the purchaser, and require no skill to detect them; as, if a horse be warranted perfect and want an ear or a tail.^b Where the seller told the purchaser that the horse was a crib-biter, and he also had a splint which was apparent; held, that a warranty that the horse was sound wind and limb at the time of the sale did not extend to those defects.^c Under a general warranty roaring constitutes unsoundness, if it proceeds from disease or organic defect,^d otherwise not.^e A nerved horse is unsound.^f A cough is unsoundness, unless it appear to be of a temporary nature only;^g but crib-biting is not.^h Lameness which renders a horse less fit for service is unsoundness;ⁱ but a temporary injury from an accident is not.^j Proof that a horse is a good drawer will not satisfy a warranty that he is a good drawer and pulls quietly in harness.^k Bone spavin in the hock is unsoundness, though it may not produce *lameness for years after;^l but mere badness of shape, (such as may produce cutting,) though rendering the horse incapable of work, is not unsoundness.^m

What amounts to a breach of a general warranty.

*1505

Where the seller informed the buyer that one of two horses he was about to sell him had a cold, but agreed to deliver both at the end of a fortnight, sound, and free from blemish; and at the expiration of that time, the horses were delivered, but one had a cough, and the other a swelled leg, which was apparent at the time of the sale; and the buyer brought an action to recover the price, and a verdict was found for the seller; the court of Common Pleas refused to disturb it, or grant a new trial, as the warranty did not apply to the time of the sale, but to a subsequent period.ⁿ A warranty of soundness is broken if the disease or defect existed at the time of the sale, although

The warranty must apply to the time of the sale.

^a Dunlop v. Waugh, Peake, 123.

^b 2 Bl. Com. 165. Butterfield v. Burroughs, 1 Salk, 216.

^c Margetson v. Wright, 7 Bing. 603. (20 Eng. C. L. 255.) 8 *id.* 454. (31 Eng. C. L. 342.) 1 M. & Scott, 622.

^d Onslow v. Eames, 2 Stark. 81. (3 Eng. C. L. 255.)

^e Bassett v. Collis, 2 Camp. 523.

^f Best v. Osborne, R. & M. 290. 2 C. & P. 74. (12 Eng. C. L. 33.)

^g Shillitoe v. Claridge, 2 Ch. 425.

^h Broennenburgh v. Haycock, Holt, 630. (3 Eng. C. L. 207.)

ⁱ Elton v. Brogden, 4 Camp. 281. ^j Garment v. Barrs, 2 Esp. 673.

^k Coltherd v. Punccheon, 2 D. & R. 10. (16 Eng. C. L. 65.)

^l Watson v. Denton, 7 C. & P. 85. (32 Eng. C. L.)

^m Dickinson v. Follett, 1 M. & Rob. 299.

ⁿ Liddard v. Kain, 9 Moore, 356. 2 Bing. 183. (9 Eng. C. L. 373.)

(1) (An affirmation that a horse is not lame, accompanied by the declaration of the owner that he would not be afraid to warrant him, is enough to establish a warranty. *Cook v. Mosely*, 13 Wend. 277.)

the existence could not then be detected, and did not appear until two months afterwards.*

Warranty
by servant
when
binding on
the master

An agent or servant employed to sell a horse and receive the price, has an implied authority to warrant, and any representation which he makes at the time of the sale will be evidence against the principal.^d And if a *horse-dealer* even gives express directions to his servant *not* to warrant, still he is bound if the servant does warrant; because, the servant having a general authority to sell, is in a condition to warrant; and the master has not notified to the world that the general authority is circumscribed;^e but if a master, *not* a horse-dealer, desire his servant not to warrant, he is not bound by any representations which the servant may make respecting the horse.^e A master, however, is not bound by any representation or acknowledgment made by the servant respecting the horse at any other time than upon the sale, without his authority. Therefore, where on the purchase of a horse, the vendor had given a warranty *of soundness generally, and the servant, who was sent with the receipt to the agent of the other party, inserted at his request, but without a special or general authority from his master, "warranted sound to the regiment;" held, that the master was not bound by this alteration of the warranty, notwithstanding the money afterwards came to his hands.^e

*1506

Condi-
tional war-
ranty.

If it be one of the conditions of sale, that the warranty shall be in force only for a limited period, the purchaser will be bound by such condition; as where the plaintiff purchased a horse warranted sound, at a repository, and one of the conditions of the sale were, that a warranty of soundness there given, should remain in force until twelve o'clock the day after the sale, when the seller's responsibility should terminate, unless notice of unsoundness was given; held, that the plaintiff not having complained of unsoundness until after twelve on the following day, was precluded from suing on the warranty.^f

Remedy
on a
breach of
warranty.

The proper course for the purchaser to pursue, where he discovers the unsoundness or other breach of the warranty, is to tender the horse to the seller, and if he refuses to receive him, to bring an action on the warranty; it is not, however, necessary in order to maintain such action, to return the horse, or even to give notice of the unsoundness. "If," said Lord Loughborough, C. J., "a horse which is warranted sound at the time of the sale, be proved to have been at that time unsound, it is not necessary that he should be returned to the seller. No

^a Joliff v. Bendell, R. & M. 136. (21 Eng. C. L. 397.)

^b Helyear v. Hawke, 5 Esp. 72. Alexander v. Gibson, 2 Camp. 555.

^c Per Bayley, J., in Pickering v. Busk, 15 East, 45.

^d Scotland (Bank) v. Watson, 1 Dow. 45.

^e Strode v. Dyson, 1 Smith, 400. Wooden v. Burford, 2 C. & M. 391.

^f Bywater v. Richardson, 1 Ad. & Ell. 508. (28 Eng. C. L. 135.) *ante*, 1080.
Buchanan v. Parnshaw, 2 T. R. 745.

length of time elapsed after the sale will alter the nature of a contract originally false. Neither is notice necessary to be Notice. given, though the not giving notice will be a strong presumption against the buyer that the horse, at the time of the sale, had not the defect complained of."^a Where the plaintiff kept the horse eleven months, and then finding it to be unsound returned it to the seller, who refused to receive it; held, that the plaintiff was entitled to recover on the warranty. "*Fielden v. Starkin*," said Lord Denman, "has never been overruled; it must therefore govern the present case."^b But it has been held, that if the buyer does not offer to return the horse, he will not be entitled to recover for his keep.^c *1507

If the purchaser has given notice of the breach of warranty, Damages. he may keep the horse for a *reasonable* time, and then sell him; in which case he will be entitled to recover what the horse would be worth if sound, deducting what it sold for;^d or the difference of price between what he paid and received for him;^e and also a compensation for the keep of the horse. Whether the horse has been kept an unreasonable time before the sale is a question for the jury.^f If he retains the horse, the measure of damages will be the difference between his real value and the price given;^g or, in the words of Lord Eldon, C. J., "the difference between the value of a sound horse, and one with such defects as existed at the time of the warranty."^h

It was held by Lord Ellenborough, that the damages in an action for breach of warranty, may be the whole value the plaintiff would have received had the defendant performed his contract.ⁱ Where *A.* warranted a horse to *B.*, which *B.*, a few *days afterwards sold to *C.*; the horse having proved un- *1508

^a In *Fielden v. Starkin*, 1 H. Bl. 17.

^b *Patteshall v. Tranter*, 3 Ad. & Ell. 103. (30 Eng. C. L. 39.) 1 H. & W. 178.

^c *Caswell v. Coare*, 1 Taunt. 567.

^d *Clare v. Maynard*, 7 C. & P. 742. (32 Eng. C. L.) 1 Nev. & Perr. 701. In this case the plaintiff had resold the horse at a profit of 10*l.*; and being obliged to refund the price on account of unsoundness, he claimed from his vendor 10*l.*, together with the original price; but Lord Denman said that the measure of damages was the fair value of the horse if sound, and that the price which the plaintiff paid was strong, but not conclusive evidence of that value; and as it did not appear that the horse was worth 10*l.* more than the plaintiff gave for him, he was not entitled to recover that sum. The court above concurred in his lordship's view of the case, and refused an application for a new trial. Coleridge, J., however, observed, that the plaintiff could not recover compensation for the loss of a good bargain. In this case the plaintiff recovered the price which he paid for the horse, and incidental expenses. But if the value of the horse, provided he is sound, is to be considered the measure of damages, as Lord Denman laid down, the plaintiff, it would seem, was entitled to what he received for him on the resale; for the value of an article is that which it fetches.

^e *Ellis v. Chinnock*, 7 C. & P. 169. (32 Eng. C. L.) *M'Kenzie v. Hancock*, R. & M. 436. (31 Eng. C. L. 484.) *Chesterman v. Lamb*, 2 Ad. & Ell. 129. (29 Eng. C. L. 48.)

^f *Id.*

^g *Caswell v. Coare*, 1 Taunt. 566.

^h In *Curtis v. Hannay*, 3 Esp. 83.

ⁱ *Bridge v. Wain*, 1 Stark. 504. (2 Eng. C. L. 486.) *Clare v. Maynard*, *supra*.

sound, *C.* recovered the price from *B.*, in an action of which *A.* had notice; held, that *B.* was entitled to recover from *A.*, not only the price of the horse, but the costs of the action by *C.*^a

The purchaser cannot return the horse and sue for the price.

But the purchaser cannot by any act of his own, upon a breach of warranty, revest the horse in the vendor, and recover the price on the ground of the total failure of consideration; his only remedy is on the warranty, unless there has been a condition in the contract authorising the return of the horse, or the vendor has received him back, and has thereby consented to rescind the contract, or has been guilty of fraud, which destroys the contract altogether.^{b(1)}

Where the purchaser of a horse warranted sound, sold it and re-purchased it; it was held, that on discovering that the horse was unsound when first sold, he could not require the original vendor to take him back again, nor set up the breach of warranty as a bar to an action by the vendor for the price of the horse, but that he might give it in evidence in reduction of damages.^c

Rescinding the contract.

If the vendor takes back the horse after unsoundness is discovered, or if he undertook at the time of the sale to take it back in case of a breach of warranty, and an offer to return the horse has been made after a reasonable trial, the contract is rescinded, and the purchaser may sue the vendor for the price, either in an action on the warranty, or for money had and received.^d Where upon a warranty of a horse as sound, the vendor, in a subsequent conversation, said, that if the horse were unsound (which he denied) he would take it again, and return the money; held to be no abandonment of the original contract, and that though the horse was unsound, the vendee could not maintain *assumpsit* to recover back the price after a "tender of the horse, this remedy being on the warranty."^e If two persons severally employ a dealer to sell their horses, and he sells both to one purchaser at an entire price, and warrants them sound, the purchaser cannot sever the contract and bring an action on the warranty against one of the sellers in respect of the unsoundness of his horse.^f

*1509

If a horse is sold with a warranty, any fraud at the time of

^a *Lewis v. Peat*, 2 Marsh. 431. 7 Taunt. 153. (2 Eng. C. L. 54.) See also *Green v. Greenbank*, 2 Marsh. 485. (4 Eng. C. L. 375.)

^b Per Lord Tenterden, C. J., in *Street v. Blay*, 2 B. & Ad. 462, (22 Eng. C. L. 122,) *ante*, 95. *Gompertz v. Denton*, 2 C. & M. 207, overruling a *dictum* of Lord Eldon's in *Curtis v. Hannay*, *ante*, 1507, "that when the horse proves unsound, the purchaser may return him, and bring an action for the full money paid."

^c *Street v. Blay*, *supra*.

^d *Long v. Preston*, 2 M. & P. 262. *Adam v. Richards*, 2 H. Bl. 573. *Towers v. Barrett*, 1 T. R. 133.

^e *Payne v. Whale*, 7 East, 274. 3 Smith, 130.

^f *Symonds v. Carr*, 1 Camp. 361.

(1) (See *Franklin v. Long*, 7 Gill & Johns. 407.)

the sale will avoid it, although it does not amount to a breach of the warranty.^a

The declaration in an action on a warranty should state the contract accurately. If the warranty be not general, but restrained by an exception, the declaration should state the qualification. Where the declaration alleged a warranty that the horse was sound, and the warranty proved was, that the horse was sound every where, except a kick on the leg; it was held, to be a fatal variance.^b But where the plaintiff declared on a warranty of a horse bought with money, and the proof was, that he had given another horse in part payment, at a certain valuation; it was held to be no variance; for the defendant agreed to receive the other horse as money.^c Where the averment in the declaration was, that in consideration the plaintiff would buy of the defendant a horse for a certain price, to wit, 55*l.*, the defendant undertook the horse was sound, and the proof was, that plaintiff purchased a horse for 55*l.*, the defendant warranting him sound, and agreeing to give 1*l.* back if the horse did not bring plaintiff 4*l.* or 5*l.*; held, a variance.^d

If there be an express warranty, the *scienter* need not be alleged, nor if stated, need it be proved.^e The particular description of unsoundness need not be stated, for it is a rule of pleading, that a breach may in general be assigned in the negative words of the contract.^f

*By Reg. Gen. H. T. 4 W. IV, "in an action on a warranty, the plea of non assumpsit will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach."^g

In an action on the case, for a deceitful warranty of soundness, the plea of not guilty puts in issue both the warranty and the unsoundness.^h

It has been held, in a modern case, that the first vendor of a horse warranted sound, is not competent to prove soundness for his vendee, in an action brought against him on a subsequent sale with warranty; for the effect of a verdict for the defendant would be, to relieve the witness from an action at his suit.ⁱ

^a Stewart v. Coesvelt, 1 C. & P. 23. (11 Eng. C. L. 305.)

^b Jones v. Cowley, 4 B. & C. 445. (10 Eng. C. L. 377.)

^c Hands v. Burton, 9 East, 349. Hort v. Dixon, S. N. P. 104. Brown v. Fry, *id.* 663.

^d Blyth v. Bampton, 3 Bing. 472. (13 Eng. C. L. 57.)

^e Williamson v. Allison, 2 East, 446. ^f 2 Saund. 181, b. 2 Ch. Pl. 172.

^g Spencer v. Dawson, 1 M. & Rob. 552.

^h Biss v. Mountain, 1 M. & Rob. 302. But it had been previously decided, that a former vendor was a competent witness under such circumstances, on the ground that the soundness of the horse at the time that he sold it was not impeached. Briggs v. Crick, 5 Esp. 99. Baldwin v. Dixon, 1 M. & Rob. 59.

CHAPTER XXV.

WILLS.

	PAGE
I. Of the nature and general requisites of a will.	
II. Who may make a will; what property will pass thereby	1513
III. Signing and attestation	1515
IV. Witnesses	1518
V. Revocation	1522
VI. Proof of a will	1529
VII. The 7 W. IV, & 1 Vic. c. 26	1532

SECTION I.

OF THE NATURE AND GENERAL REQUISITES OF A WILL.

A WILL or testament is defined to be the legal declaration of a man's intentions, which he wills to be performed after his death.^a It may relate either to real or to personal property; in the former case it is denominated a devise. At common law no interest in land greater than for a term of years could be disposed of by will, except in Kent and some particular boroughs by custom, until the 32 Hen. VIII, c. 1, (explained by 34 & 35 Hen. VIII, c. 5,) empowered persons seised in fee simple to devise the same by will in *writing*. As the only solemnity which this statute required was that the will should be in writing, it was determined that bare notes taken by another person from the testator's mouth for the purpose of being reduced into form, though not signed or sealed by the testator, constituted a good will.^b

The statute of wills.

*1512 Numerous frauds and perjuries having been thereby introduced, it was enacted by 29 Car. II, c. 3, s. 5, that "all devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by this statute, or by the custom of Kent, or of any borough, or any other particular custom, should be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and should be attested and subscribed in the presence of the devisor, by three or four credible witnesses, or else they should be utterly void and of none effect." By section 12, estates *pur autre vie* were devisable by will executed in a similar manner.

^a 2 Bl. Com. 499.

^b 1 Sid. 315. 1 And. 34, cited 7 East, 324. Brown's case, Dyer, 72. Cro. Eliz. 100. 2 Bl. Com. 376.

Personal property, including leasehold estates, was disposable by will at common law, which did not require such wills to be in writing; oral evidence of the verbal disposition of such property by the testator being deemed sufficient. But verbal or nuncupative wills having been found productive of great impositions, it was provided by the above statute* that no such will (the wills of soldiers and mariners excepted) should be valid, when the estate bequeathed by it exceeded 30%, unless certain formalities therein prescribed were complied with. "Thus," says Sir William Blackstone, "the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself is fallen into disuse, and is hardly ever heard of."^b A will disposing of personal property, reduced into writing by the testator himself, or by his direction, or approved of by him, has been held to be an available instrument within the above statute, though not signed or sealed by the testator, nor attested by any witness.^c

Copyhold lands and customary estates passing by surrender were not within the provisions of the statute of frauds, and consequently a will disposing of such lands required no other solemnity than a will relating to personal property.^d

By the 1 Geo. I, c. 19, the 33 Geo. III, c. 28, and 36 Geo. III, c. 24, stock in the funds might be bequeathed by a will *attested by two witnesses. But notwithstanding these acts, it has been held that a bequest of stock by any instrument entitled to probate, might be enforced in equity by the legatee against the executor.^e

Such is a general outline of the law which regulated wills previous to the year 1828, but now by 7 W. IV, & 1 Vict. c. 26, all antecedent statutes relating to testamentary dispositions are, in general, repealed; and new provisions involving very important alterations, which will be considered hereafter, are substituted. By this statute the distinction which had previously prevailed between wills relating to real and those relating to personal property is abolished, and the following regulations are directed to be observed in making testamentary dispositions of property of every description. The will or codicil must be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and the signature must be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time, who must attest and subscribe the will or codicil in the presence of the testator.^f No particular form is required

Will of
personal
property.

Copy-
holds.

Stock in
the funds.

*1513

The new
act.

Execution
and attest-
ation of a
will.

* Sec. 19, 20, 21, 22, 23.

^b 2 Bl. Com. 501.

^c *Id.* Toller, Exec. 2.

^d *Roe d. Gilman v. Heyhoe*, 9 Bl. 1114. *Doe d. Cook v. Danvers*, 7 East, 299. 56 G. III, c. 192. *Hume v. Randall*, 6 Mod. 288.

^e *Franklin v. The Bank of England*, 1 Russ. 575. 9 B. & C. 162. (17 Eng. C. L. 347.)

^f Sec. 9.

either in the terms or in the attestation of a will. A will executed in the manner above directed, requires no other publication.^a

SECTION II.

WHO MAY MAKE A WILL; WHAT PROPERTY WILL PASS THEREBY.

Infants. By the common law, male infants of the age of fourteen years, and females of the age of twelve years, might bequeath their personal property; the statute of wills, however, (34 & 35 Hen. VIII,) confine the power of testamentary disposition to persons who had attained the age of twenty-one years, so that *1514 that *infants were incapable of devising real property; but by the recent statute, "no will made by any person under the age of twenty one years shall be valid."^b

Married women. At common law a married woman could not in general make a will because all her personal property devolved upon her husband by the marriage; and by the statute of wills, she was expressly incapacitated from devising real property. The recent statute provides that, "no will made by a married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act."^c The disability of coverture, therefore, remains unaffected by that act. A married woman may be empowered to make a will of her real or personal property, by an express stipulation with her intended husband previous to the marriage;^d or it seems that she may bequeath any personal property which was originally hers, or the savings out of her personal estate, with the consent of her husband, which consent, however, may be revoked.^e So, if the husband is banished by act of parliament, or has abjured the realm, the wife may make a testamentary disposition of her real or personal property;^f and so it seems if he be under sentence of transportation as a felon.^g

The recent statute provides generally, that every person may devise his property except in the two cases of infants and married women, leaving cases of other personal disabilities as they

^a Sec. 13. And even before this enactment, it was clearly settled that a publication, as distinguished from mere attestation, was not necessary to the validity of a will under the statute of frauds. *White v. Birt*, 6 Bing. 310. (19 Eng. C. L. 91.) *Wright v. Wright*, 7 Bing. 457. (20 Eng. C. L. 197.) *Ward v. Swift*, 1 C. & M. 175.

^b 7 W. IV & 1 Vic. c. 26, s. 7.

^c *Id.* s. 8.

^d *Rippon v. Dowding*, Amb. 565. *Wright v. Cadogan*, 2 Eden, 239.

^e *Herbert v. Herbert*, Prec. Ch. 44. *Peacock v. Monk*, 2 Ves. 190.

^f *Countess of Portland v. Prodgers*, 2 Vern. 204.

^g *Ex parte Franks*, 7 Bing. 762. (20 Eng. C. L. 323.) 1 M. & Scott, 11. See *ante*, 208.

stood at common law; so that it may be laid down as a general rule, that, with the exception of infants, married women, idiots, persons born blind, deaf and dumb, lunatics and persons laboring under a mental incapacity, who have not sufficient understanding to manage their own affairs, and who, therefore, at common law were incapable of disposing of their property by will, every person may bequeath or dispose of by will, executed in the manner above described, all real and personal property to which he shall be entitled either in law or in equity *at the time of his death*, and which, if not disposed of by will *would devolve upon his heir at law, or customary heir, or upon his executor or administrator, &c.^a

Persons incapable of making a will.

What property may be bequeathed.

*1515

It is observable, that under the old law, freehold or copyhold estates acquired after the *date* of the will did not pass thereby; whereas, by the recent act, *every kind of property* which the testator may be entitled to *at the time of his death*, even that which he may have acquired after the execution of his will, will pass, if the intention that it should pass be sufficiently indicated by his will.(1)

SECTION III.

SIGNING AND ATTESTATION.

In the preceding pages we have shown what are the general requisites of a will; it is now proposed to consider how these requisites must be effected. The statute of frauds required the will to be signed by the party devising. It has been held to be a sufficient compliance with this provision, if the testator signed his name at the beginning of the will, for the statute did not require him to subscribe it; as where he wrote the will himself, beginning "I, Henry Jones," &c.^b

What constitutes a sufficient signing.

Where a will which was written on three sides of one sheet of paper, and duly attested by three witnesses, concluded by stating "that the testator had signed his name to the two first sides thereof, and his hand and seal to the last," and it appeared that he had put his name and seal to the last only, but had omitted to sign his name to the two first sides; held, that the will was well executed; as, whatever might have been the testator's former intention, it was abandoned by the final signature made by him at the time of executing the will.^c

But where a will consisted of several sheets, and the testator

^a 7 W. IV & 1 Vic. c. 26, s. 3.

^b *Lemayne v. Stanley*, 3 Lev. 1.

^c *Winsor v. Pratt*, 5 Moore, 484. 2 B. & B. 650. (6 Eng. C. L. 399.)

(1) (*Girard v. The Mayor &c. of Philadelphia*, 4 Rawle.)

signed two of them, and intended to sign the rest, but was prevented from weakness; it was held, that the will was incomplete, for the testator did not mean the signature of the two first as the signature of the whole.^a If the testator could not write, *1516 *his mark would be sufficient.^b But his seal, without his signature, would not suffice,^c though the contrary was held in some of the earlier cases.^d

Signing
under the
new Act.

Though the signature of the testator, in any part of the will was sufficient to satisfy the statute of frauds, the recent act requires the will to be signed by the testator, or some other person in his presence, or by his direction, at the *foot* or *end* thereof.^e Under this statute, the signature may be either the name of the testator or his mark, as before; but it must be at the end of the will.

Attestation.

The statute of frauds required the will to be attested and subscribed in the presence of the deviser; but it was not necessary that the testator should sign in the presence of the witnesses, it was sufficient if he had acknowledged the will or the signature in their presence, either separately or all together;^f nor was it necessary that the witnesses should know that the instrument was a will;^g though the witnesses were required to sign the will in the presence of the testator, yet it was not necessary that the testator should see them sign, it was sufficient to show that he was so situated that he *might* have seen them do so; as where he was in one room and the witnesses attested the will in another room, in which he might see them through a broken window; it was held sufficient.^h So, where the testator was in bed, and might have seen through an open door into the next room.ⁱ So, where the testatrix sat in her carriage, from which she might see the witnesses through a window in an attorney's office.^j But, where the attesting witnesses retired from the room where the testator had signed, and subscribed their names in an adjoining room, *1517 *and the jury found that, from one part of the testator's room, a person by inclining himself forwards with his head out at the door might have seen the witnesses, but that the testator was not in such a situation in the room that he might, by so inclining, have seen them; held, that the will was not duly attested.^k

^a Right d. Cator v. Price, Doug. 241.

^b Lemayne v. Stanley, *supra*.

^c Smith v. Evans, 1 Wils. 313. Gregson v. Atkinson, 2 Ves. sen. 458. See 17 Ves. 459. 1 Sugd. Powers, 266.

^d Lea v. Sibb, 1 Show. 69. Warneford v. Warneford, 2 Stra. 764.

^e 7 W. IV & 1 Vic. c. 26, s. 9.

^f Grayson v. Atkinson, 2 Ves. sen. 454. Westbeach v. Kennedy, 1 Ves. & B. 362. Johnson v. Johnson, 1 C. M. 140.

^g Peate v. Ougley, Comyns, 197. White v. The Trustees of the British Museum, 6 Bing. 310. (19 Eng. C. L. 91.)

^h Shires v. Glasscock, 1 Salk. 668.

ⁱ Davy v. Smith, 3 Salk. 395. Todd v. The Earl of Winchelsea, M. & M. 12. (12 Eng. C. L. 227.)

^j Casson v. Dale, 1 Bro. Ch. C. 99.

^k Doe d. Wright v. Manifold, 1 M. & S. 294. "I should have great doubts on this

An attestation by a mark was sufficient.^a The will need not have been subscribed by all the witnesses at the same time, nor in each other's presence. If, however, they attested at several times, one witness would not be sufficient to prove the execution.^b Where the deviser published his will in the presence of two witnesses, who subscribed it in his presence, and some time after sent for a third witness, and published it in his presence; it was held sufficient.^c It was not necessary that the attestation should be stated on the face of the will; where all the witnesses were dead, and the attestation stated that the will had been signed by the testator, in the presence of the witnesses, without saying that they had subscribed the will in his presence; it was held, that the jury might presume that fact.^d

If the will was written at one time on separate pieces of paper, and signed by the testator, and all were produced at the time of the execution, it was sufficient if the last sheet was attested by the witnesses.^e But subscribing the last sheet was not sufficient, unless the witnesses saw the other sheets.^f

The only alteration made by the recent act in respect of attestation is, that the witnesses to the will must both be present *at the same time* when the signature is made or acknowledged by the testator,^g whereas previously, as we have seen, an acknowledgment to the different witnesses at several times was deemed sufficient. The provision respecting the subscription *of the witnesses is the same as in the statute of frauds: the words are, "such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." It is apprehended, therefore, that the foregoing decisions respecting attestation will, with the exception above stated, equally apply to wills under the new act, and that the constructive presence of the testator when the witnesses are signing, will be sufficient. It may however admit of some doubt, whether, as the statute requires that both the witnesses should be present at the same time when the testator signs, and that they should sign in his presence, the legislature did not intend that the witnesses should sign in the presence of each other; yet as the words used are the same as those in the statute of frauds, it is apprehended that the courts will adopt the old construction, namely, that the witnesses need not sign at the same time, or in the presence of each other.

Signing
and attestation
under the
new act.

*1518

case," said Lord Ellenborough, "if the jury had not negatived the testator's being in a situation that he might have seen the attestation; for in favor of attestation it is presumed, that if the testator might see, he did see." *Id.*

^a Harrison v. Harrison, 8 Ves. 185.

^b Cook v. Parson, Prec. in Chan. 185.

^c Jones v. Lake, 2 Atk. 176, n.

^d Croft v. Pawlett, 2 Stra. 1109. Price v. Smith, Willes, 1.

^e Bond v. Seawell, 3 Burr. 1773.

^f Lea v. Libb, 3 Mod. 262.

^g Sec. 9.

SECTION IV.

WITNESSES.

Who were competent witnesses under the statute of frauds.

THE statute of frauds required a will to be attested by three or four *credible* witnesses. It seems to have been held in general that an *incompetent* witness was not a *credible* witness.^a Incompetency proceeds from a defect in understanding, want of religious belief, a conviction of an infamous crime, or interest; idiots, insane persons, and lunatics are incompetent, and therefore not *credible* witnesses; so are children who are incapable of distinguishing between good and evil. The competency of children depends not upon their age, but upon the sense and understanding which they manifest on examination by the court.^b Atheists, and persons who profess no religion that can bind their consciences to truth, or who do not believe in a future state of rewards and punishments, are incompetent witnesses.^c *It is not enough that a witness believes himself bound to speak the truth from regard to character, the common interest of society, or fear of temporal punishment, unless he believes there is a God who will reward or punish him.^d

Incompetency from infamy.

Persons convicted of an infamous crime, as treason, felony or of any species of the *crimen falsi*, as forgery, perjury, subornation of perjury, or the like, are incompetent witnesses.^e So are persons convicted of barratry,^f of bribing or conspiring to bribe a witness to absent himself,^g of any crime declared infamous by statute, as winning by fraud at certain games contrary to the 9 Ann. c. 14, s. 5.^h But a conviction for keeping a gambling-house,ⁱ or for conspiring to raise the funds by false rumors,^j does not render the party an incompetent witness. A person objecting to the testimony of a witness on the ground of his having been convicted of an infamous offence, must produce the record of a conviction and judgment, or a copy there-

^a 2 Stark. Ev. 921. *Pendock v. Mackinder*, 2 Wils. 18.

^b 1 Phil. Ev. 19. B. N. P. 293. 1 East, P. C. 443.

^c Gilbert Ev. 129. B. N. P. 292. 1 Phil. Ev. 21.

^d *Ruston's case*, Leach, C. C. 456. 1 Phil. Ev. 24. "The proper mode of examining a witness for the purpose of trying his competency in religious principle, is not to question him as to his particular opinions, but whether he believes in God, the obligation of an oath, and a future state of rewards and punishments." Per Buller, J., R. v. Taylor, Peake, 11. All persons ought to be sworn according to the ceremonies of their religion, or in that form which they deem most binding on their consciences. *Omichund v. Barker*, Willes, 549. *Edmonds v. Rowe*, R. & M. 77. (21 Eng. C. L. 385.) *Atcheson v. Everitt*, Cowp. 390.

^e Com. Dig. Testim. (A. 3, A.) Co. Litt. 66. B. N. P. 291.

^f B. N. P. 292. R. v. Ford, 2 Salk. 690.

^g *Clancey's case*, Fort. 209. *Bushell v. Barrett*, R. & M. 434. (21 Eng. C. L. 483.)

^h Co. Litt. 6, b.

ⁱ *Id.* R. v. Grant, R. & M. 270. (21 Eng. C. L. 436.)

^j *Crowther v. Hopwood*, 3 Stark. 21. (14 Eng. C. L. 149.)

of;* an admission by the witness himself that he was imprisoned under such judgment, or that he had been guilty of perjury on another occasion, will not affect his competency, though it may injure his credit.^b A conviction, unless followed up by a judgment, will not disqualify.^c

The competency of a witness who has been rendered incompetent by being convicted of a crime is restored by pardon,^d unless where incompetency is made part of the punishment by *statute; as in case of a conviction for perjury, or subornation of perjury, under the 5 Eliz. c. 9.^d So, with the exception of perjury and subornation of perjury, and capital offences, the competency of a party will be restored by having endured the punishment adjudged for the offence.^e

Competency of an infamous witness restored. *1520

It is a general rule in the law of evidence, that a party who is directly interested in a litigated matter is an incompetent witness therein. In accordance with this rule, a devisee or legatee under a will was held incompetent;^f although a mere executor or trustee who took no beneficial interest under the will was deemed competent.^g

Incompetency from interest.

Executor.

Doubts having prevailed whether the term "credible" related to the time of attestation or to the time of proof,^h it was enacted by 25 Geo. II, c. 6, s. 1, that if any person shall attest the execution of any will or codicil, to whom any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate, other than charges on lands, &c., for payment of any debt or debts, shall be thereby given or made, such devise, &c., shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be void; and such person shall be admitted as a witness to the execution of such will or codicil.ⁱ And by s. 2, "in case, by any will or codicil, any lands, &c. shall be charged with debts; and any creditor, whose debt is so charged, shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil." By sec. 3, "a witness whose legacy has been paid or accepted and released, or who shall have refused to accept such legacy on tender made, shall be admitted as a witness."^j

Incompetency of legatees.

Creditor.

By sec. 5, "a legatee dying in the lifetime of the testator, or *before he shall have received or released, or refused to receive his legacy, shall be a competent witness." By sec. 6, "the

*1521

* R. v. Castle, 8 East, 79.

^b *Id.* R. v. Steele, 11 East, 309. Rands v. Thomas, 5 M. & S. 246.

^c Lee v. Gansell, Cowp. 3.

^d Com. Dig. Testim. (A. 3, 4.)

^e B. N. P. 292. See 7 & 8 Geo. IV, c. 28, s. 13.

^f 9 Geo. IV, c. 32, ss. 3 & 4.

^g Holdfast d. Anstey v. Dowsing, 3 Stra. 1253. Hilyard v. Jennings, Carth. 514.

^h Bettison v. Bromley, 12 East, 250. Phipps v. Pitcher, 6 Taunt. 220. (1 Eng. C. L. 363.) Goss v. Tracey, 1 P. Wms. 290.

ⁱ Holdfast d. Anstey v. Dowsing, *supra*. Wyndham v. Chetwynd, 1 Burr. 417.

credit of every such witness shall be subject to the consideration of the court and jury as in all other cases."

It has been held under this statute, that where an estate in fee, on the determination of a life estate, was devised to the wife of one of the attesting witnesses to the will, and the testator and devisee died before the life estate was determined, the husband of the devisee was not a good attesting witness to the will,^a and that a devise to one attesting witness was void, though there were three other witnesses.^b

It has been recently decided that the above statute does not extend to wills of personal property, and therefore, that a legacy to a person who was an attesting witness to such will was not void;^c and where a witness took a pecuniary interest under a will; it was held, that he was a competent witness to prove the sanity of the testator in a suit in which the effect of the verdict would be to establish the will as to the real property only.^d

Witnesses under the 1 Vic. c. 26.

The preceding remarks relate to the competency of witnesses to wills under the statute of frauds; it is observable that the recent statute has introduced some important alterations in that respect. In the first place, it does not require a will to be attested by "*credible* witnesses;" it is sufficient if it be attested by two witnesses,^e whether they be competent or not to give evidence in a court of justice. An idiot, a lunatic, or a felon will be a good witness to a will under the new act, though an incompetent witness to prove the execution of it.^f A legatee, or the husband or wife of a legatee, is a good witness to prove the execution of a will; but then, whether the property be real or personal, the legacy to the witness, or his or her wife or husband, is void.^g So, a creditor is a good witness though the will contain directions to pay debts; and the debt remains valid notwithstanding his being admitted as a witness;^h so is an executor.ⁱ

*1522
Creditor.

Executor.

Distinction between the old and the new law.

The distinction between the old and the new law is this, the former required credible witnesses; credibility is immaterial under the recent act. Under the former the legatee, under a will of personal estate, did not lose his legacy by becoming a witness to the will;^j under the latter, the legacy in such case is void;^k under the former, a bequest to the wife or husband of

^a Hatfield v. Thorpe, 5 B. & A. 589. (7 Eng. C. L. 199.)

^b Doe v. Mills, 1 M. & Rob. 288.

^c Emanuel v. Constable, 3 Russ. 436. Foster v. Banbury, 3 Sim. 40. Brett v. Brett, 3 Addams, 210. But see Lees v. Summersgill, 17 Ves. 508, where the contrary was held.

^d Doe d. Wood v. Teague, 5 B. & C. 335. (11 Eng. C. L. 248.)

^e See sec. 9.

^f See sec. 14.

^g Sec. 15.

^h Sec. 16. 25 Geo. II, c. 6, s. 2, *ante*, 1520.

ⁱ Sec. 17. See *ante*, 1520, n. d.

^j Emanuel v. Constable, *ante*, 1521. Foster v. Banbury, *id.*

^k Sec. 15.

the witness rendered the will void;^a under the latter the will remains good, but the legacy is void.^b

SECTION V.

REVOCATION.

	PAGE		PAGE
1. Revocation under the statute of frauds.		3. Revocation under 7 W. IV. & 1 Vict. c. 26.	1527
2. Implied revocation.	1525		

1.—*Revocation under the statute of frauds.*] THE 29 Car. Modes of revoking a will of real property. II, c. 3, s. 6, enacts, that “no devise in writing, of lands, tenements, or hereditaments, nor any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same; or by burning, cancelling, tearing, or obliterating the same, by the testator himself or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator, or by his directions, in manner aforesaid; or unless the same be altered by some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or four witnesses, declaring the same.”

*Under this section a will relating to real property might be revoked by another will or codicil, or by other writing declaring the same, by burning, cancelling, &c. It has been determined that a second will did not operate as a revocation of a former will, unless it was executed with all the formalities required by sec. 5,^c even though it contained a clause of express revocation; as where the second will was attested by three witnesses, but they did not sign their names in the presence of the testator.^d *1523

The mere fact of making a second will did not revoke a former one. Where the jury found that the testator had made a second will containing a different disposition from a former one, but the particulars of that difference were unknown and the second will was not produced; it was held to be no revocation of the first.^e So, if a subsequent will, though expressly revoking a former one, was itself destroyed, the former, if subsisting, was revived.^f

^a Hatfield v. Thorpe, 5 B. & A. 589, (7 Eng. C. L. 199,) ante, 1521.

^b Sec. 15.

^c Ante, 1512.

^d Onyons v. Tyrer, 1 P. Wms. 343. Eccleston v. Peake, 1 Show. 89.

^e Goodright d. Rolfe v. Harwood, Cowp. 89. 2 Bl. 937.

^f Id. Glazier v. Glazier, 4 Burr. 2512.

Revoca-
tion by
some
other writ-
ing.

To effect a revocation by some *other writing*, the testator must have signed the writing in the presence of the witnesses, but it was not necessary that the witnesses should sign it in his presence, as in case of a will; nor did the statute require that they should sign it at all.^a

Revoca-
tion by
burning,
cancelling
&c.

In order that a burning, cancelling, tearing, or obliteration might operate as a revocation of a will, the act of burning, &c., must have been done with an intention to revoke; it was not, however necessary that the will should be totally destroyed, burnt or torn to pieces. Where the testator *slightly tore* the will, rumpled it together, and threw it on the fire, with an intention to burn it, and having been a *little singed*, it fell off and was preserved by a bystander without the knowledge of the testator; it was held to amount to a revocation, for there was both a burning and a tearing.^b

*1524

But to effect a revocation by any of the acts above stated, the will itself must have presented some outward and visible token of such act having been done to it; and the inference, from what fell from the court in a recent case,^c is, that tearing or burning part of the paper on which the will was written was not of itself sufficient, unless some injury was done to a material part of the writing, whereby the entirety of the will was destroyed and it no longer existed in the way in which it was originally framed by the testator.

Where the testator threw his will (inclosed in an envelop) into the fire, with an intention to burn it, and before it received any injury (the envelop being merely singed) it was rescued by the devisee, who led the testator to believe that it had been destroyed; it was held not to operate as a revocation; for there was no visible act done to the will, and an intention to revoke was not sufficient to satisfy the statute, unless demonstrated by some external symbol of revocation.^d Where there were duplicates of a will, one in the custody of the testator and the other not, and the testator cancelled that which was in his custody *animo revocandi*, it was held to be an effectual cancelling of both and to operate as a revocation.^e

Intention.

Where the question of revocation turns upon the *intention* of the testator, it is a question of fact for the jury; but whether the act done amounts to a revocation, is a question of law. (1) Where a testator having quarrelled with one of the devisees named in his will, began to tear it in a fit of passion, with the intention of destroying it, and having torn it into four pieces, he was prevented from proceeding further, partly through the efforts of a bystander, and partly by the entreaties of the devi-

^a Townsend v. Pearce, 8 Vin. Ab. tit. Devise.

^b Bibb v. Thomas, 2 Bl. 1043.

^c Doe d. Read v. Harris, 1 Nev. & P. 405. 1 W. W. & Dav. 106.

^d *Id.*

^e Burtenshaw v. Gilbert, Cowp. 52.

see; he afterwards became calm, and having put by the several pieces, expressed his satisfaction that no material part of the writing had been injured, and that it was no worse; held, that it was properly left to the jury to say whether he had completely finished all that he intended to do for the purpose of destroying the will; and the jury having found that he had not, the court refused to disturb the verdict.^a

But where a testator after the execution of his will made interlineations ^aand obliterations, and afterwards made a fair copy which was not signed or attested, and both the interlined will and a copy were found locked up in a drawer at his residence. The court, upon a special case reserved, held, that it was not a revocation.^b No violence will operate as a revocation where the party was of unsound mind at the time of the act.^c *1525

The declarations of the testator which are contemporary with the act, are admissible to show his intention and the legal quality of the act.^d

2.—*Implied revocation.*] Independently of the various Under modes pointed out by the statute of frauds whereby a will might be revoked, it was clearly established that a revocation might be implied from a total change in the circumstances of the testator's family after the execution of the will, or from a subsequent disposition or new modelling of his estate inconsistent with the provisions of the will. Thus it had been held that the subsequent marriage of the testator and the birth of a child would operate as a revocation of a previous will, if all the testator's property had been disposed of by the will, and the wife and children were wholly unprovided for.^e This doctrine was considered by a very eminent judge to be founded on a presumption of an intention on the part of the testator to revoke his will under the circumstances.^f But Lord Kenyon subsequently^g intimated an opinion that it was founded on a tacit condition annexed to the will at the time it was made, that it should not take effect if there should be a total change in the situation of his family. Whether parol evidence of the testator's declarations was admissible to rebut the ^hpresumption of such implied revocation, a difference of opinion prevailed.ⁱ *1526

^a Doe d. Perkes v. Perkes, 3 B. & A. 489. (5 Eng. C. L. 353.) Fitner v. Fitner, cited 3 Wils. 508.

^b Winsor v. Pratt, 2 B. & B. 650. (6 Eng. C. L. 229.)

^c Scruby v. Fordham, 1 Phil. Adm. 74.

^d Bortenshaw v. Gilbert, Cowp. 53. 2 Stark. Ev. 936.

^e Doe d. Lancashire v. Lancashire, 5 T. R. 58. Christopher v. Christopher, 4 Burr. 2182. Kenebel v. Sraffton, 2 East, 530. Brady v. Cubitt, Doug. 30. The marriage and subsequent birth of a child must have both concurred, the birth of a posthumous child alone, though the testator died childless, was not sufficient. Doe v. Barford, 4 M. & S. 10.

^f Per Lord Mansfield, C. J., Doug. 30.

^g In Doe d. Lancashire v. Lancashire, *supra*.

^h In the affirmative, Lugg v. Lugg, 1 Lord Raym. 441. Brady v. Cubitt, *supra*.

Acts
which im-
plied a re-
vocation.

It was an established rule of law, that to pass an estate by devise, the testator must have been *seised* of it at the date of his will, and have *continued so seised* down to the time of his death; therefore, whenever the testator did any act whereby his whole interest in the lands devised was conveyed, even for one moment, it operated as a revocation of a previous will, even though he took the *same estate* back again.^a Thus it has been held, that suffering a recovery,^b levying a fine,^c executing a conveyance of the whole estate to another, was a revocation of a previous will.^{d(1)}

Even dealing with the estate with an intention to make a different disposition of it, has been held to be a revocation, though the *seisin* of the testator remained uninterrupted from the date of the will down to his death. Thus a contract for the sale of the lands devised, was held a revocation, though the contract was bad, and rescinded after the testator's death.^e So an attempt to appoint, where the testator had no power.^f Even an imperfect conveyance as a bargain and sale, *without* enrolment, has been held to be a revocation, because it imported an intention to revoke.^g But where the testator surrendered copyhold lands to the use of his will, and afterwards surrendered the same lands to the use of his marriage settlement; held, that the latter surrender was not revoked by the former, but the devisee took the copyhold lands subject to the charge created by the settlement.^h So where a man made his will,
*1527 *and afterwards devised the estate for a term of years; it was held to be a revocation for the term only, and the devisee took the estate subject to the lease.ⁱ

Repub-
lication.

The statute of frauds contained no express provision for the republication of wills; but it was held, on the construction of that statute, that the same ceremonies were requisite to the republication as to the revocation of wills of freehold estates.^j It has been held, that a codicil, attested by three witnesses, "to be taken as part of his will," operated as a republication, without any intention to republish being expressed, and the lands contracted for before the date of the will, and conveyed between it and the codicil, thereby passed.^k Wills of personal or

Goodtitle v. Otway, 2 H. Bl. 532. In the negative, *Gibbons v. Caunt*, 4 Ves. 848. *Kennebal v. Scrafton*, 5 Ves. 664.

^a *Roe v. Griffith*, 4 Burr. 1960. 1 Saund. 278.

^b *Parker v. Briscoe*, 3 Moore, 24. (4 Eng. C. L. 252.) 1 Saund. 278.

^c *Id.* Doe d. *Lushington v. Landaff*, 2 N. R. 491. Doe d. *Dilnot v. Dilnot*, *id.* 401.

^d 1 Saund. 278, *a*.

^e *Bennet v. Tankerville*, 19 Ves. 178. But a deed obtained by fraud is no revocation. *Hawes v. Wyatt*, 3 B. & C. 156.

^f *Shove v. Pink*, 5 T. R. 126.

^g 2 Saund. 278, *a*.

^h *Vawser v. Jefferey*, 3 B. & A. 462. (5 Eng. C. L. 346.)

ⁱ 2 Saund. 78, *b*.

^j See 1 Saund. 297, *d*.

^k *Goodtitle v. Meredith*, 2 M. & S. 5. *Rowley v. Eyton*, 2 Mer. 128. *Gibson v. Rogers*, Amb. 97. *Pigott v. Walker*, 7 Ves. 98.

(1) (*Skerrett v. Burd*, 1 Wharton, 246.)

copyhold property might heretofore be revoked or republished by parol declarations.*

3.—*Revocation under 7 W. IV, & 1 Vic. c. 26.* [The preceding remarks apply only to the revocation of wills made previous to 1838. But the new act has introduced very material alterations in that respect, which it is now proposed to notice. Under this act a will made by a man or woman (unless made in exercise of a power of appointment) will be revoked by his or her marriage.^b So a will may be revoked by another will or codicil duly executed, or by some other writing declaring an intention to revoke the same, and executed as a proper will; or by burning, tearing, or otherwise destroying the will of the testator, or by some persons in his presence and by his direction, with the intention of revoking the same;^c or it may be partially revoked by attested cancellations, obliterations, or alterations.^d With regard to a revocation by marriage, it is observable that the will of a woman was always revoked by her marriage, so that in this respect there is no alteration.^e But previous to this act, marriage, unless attended *with the birth of a child, had no effect on the will of a man.^f *1528

The old law as to the operation of a will which revokes a prior one, does not appear to be altered. A second will, though expressly revoking all former wills, will not operate as a revocation unless it be duly executed in the manner prescribed by this act; and any other writing declaring an intention to revoke a will, must be executed in the same manner as a proper will. This latter provision obviates a doubt created by the ambiguous phraseology of the sixth section of the statute of frauds, under which it was considered that such writing need not be executed with all the solemnities of a will.^g It is observable that the recent act has omitted two modes of revocation which were authorised by the statute of frauds; namely, by *cancelling* or *obliterating*. The words are "no will shall be revoked otherwise than by burning, tearing or otherwise *destroying* the same by the testator," &c.^h And it provides, that no obliteration, interlineation, or other alteration made in a will after it is executed, shall have any effect, unless the will is re-executed, or unless the words or effect of the will before such obliteration shall not be apparent.ⁱ The only difference effected by this provision is, that the cancelling or obliteration must be signed and attested with all the solemnities of a will, whereas the statute of frauds did not require signing or attestation. Though the word *destroying* was not in the

How a will may be revoked under the new act.

*1528
Distinction between the old and the new law in respect of revocation.

* Long v. Aldred, 3 Add. 48. Miller v. Brown, 2 Hagg. 209.

^b 7 W. IV & 1 Vict. c. 26, s. 18.

^c Sec. 20.

^d Sec. 21.

^e Per Lord Kenyon, C. J., in Doe v. Staples, 2 T. R. 695.

^f See ante, 1525, n. d.

^g See ante, 1523.

^h Sec. 20.

ⁱ Sec. 21.

statute of frauds, it is apprehended that the decisions under that statute as to revocation by burning, &c.,^a will apply to the recent act; and that the words, "otherwise *destroying*," imply modes of destruction *ejusdem generis*, as by cutting, and not that the will should be totally destroyed.

Under this statute a revocation cannot be implied, as formerly,^b from subsequent alterations in the testator's circumstances,^c or from any subsequent dealing with his property, except so far as the actual beneficial interest may be gone at his "death;"^d and no will or codicil which has been revoked can be revived, otherwise than by the re-execution thereof;^e and though the provisions of this act do not extend to any will made before the 1st of January 1838, yet a will previously made cannot be revived after that period, unless it be re-executed, or by a codicil executed in the same manner as an original will. The words of the act are, "that every will re-executed, or re-published, or revived, shall for the purposes of this act, be deemed to have been made at the time at which the same shall be so re-executed, re-published, or revived."^f

SECTION VI.

PROOF OF A WILL.

Mode of
proving a
will.

In order to establish a devise of real property, the will itself must be produced; an exemplification, a copy, or the probate is not sufficient.^g If, however, the will be lost or destroyed, or in the possession of the opposite party; upon proof of its having been in existence, and of its subsequent loss or destruction, or of the possession of the other party, and notice to them to produce it, secondary evidence of its contents is admissible according to the ordinary course of proving a written instrument. The proper evidence in such case is, the register-book, or ledger-book,^h or an examined copy; or if the absence of these be duly accounted for, parol evidence of the

^a See *ante*, 1523.

^b See *ante*, 1525.

^c Sec. 19. Marriage operates as an *express* revocation.

^d Sec. 23.

^e Sec. 22.

^f Sec. 34.

^g B. N. P. 246. See *ante*, 936. But the probate or letters of administration, with the will annexed, are the only legal evidence of the will in all cases relating to personal property; per Lord Kenyon, C. J., in *R. v. Netherseal*, 4 T. R. 260. If the probate has been lost, an exemplification under the seal of the court, or an examined copy of the act book, (*Elden v. Kennell*, 8 East, 187.) or the original will properly authenticated, and indorsed as the instrument upon which the probate has been granted, (*Gorton v. Dyson*, 1 B. & P. 219,) are admissible as secondary evidence. See *ante*, 1001.

^h *St. Leger v. Adams*, Lord Raym. 731. B. N. P. 246.

contents of the will may be admitted; but the probate is not admissible in evidence, without proof *aliunde* that it is a true copy; *for the spiritual court has no authority to authenticate a will of lands.^b *1530

When the will is produced, one at least of the attesting witnesses should be called to prove its execution.^c Where, to prove the due execution of a will, one of the three witnesses was called, who stated that he and one of the other witnesses saw the testator sign the will, but that the third witness was not then present, though the signature to the attestation was of his handwriting; Lord Denman held, that this was not sufficient, without either calling the third witness, or accounting for his absence.^d But though one of the witnesses is sufficient if he can speak to all the requisites of attestation,^e the opposite party may examine all the witnesses. He cannot however, insist on the other party calling them. But it is said, that on an issue out of chancery, all the witnesses ought to be called.^f Where, at the trial of an issue out of chancery, one of the three witnesses to the will swore to its execution, and the plaintiff in chancery afterwards brought ejectment on his own demise, as heir at law; in this action, an order of court was made, that the short-handwriter's notes of the evidence of such witnesses on the trial of the issue, as should be dead before the trial of the ejectment, should be read at the latter trial. The defendant proved the former testimony of the above mentioned witness, who was dead, from the short-handwriter's notes, and produced a will, which was identified with that proved on the trial of the issue out of chancery; held, that this was sufficient proof of the execution of the will, though another attesting witness was present at the trial of the ejectment.^g

Though the party who is to establish the will must produce an attesting witness, if possible, he is not concluded by his evidence; for if such witness denies his attestation, or swears that the will was not duly executed, and even if all the witnesses should deny the due execution, the will may be established by other testimony.^h Where two of the attesting witnesses were dead, and the surviving witness charged them with fraud in the attestation of the will, evidence of their good cha-

Proof of execution.

A party calling a witness is not concluded by his evidence. *1531

^a Doe d. Ash v. Calvert, 2 Camp. 390. 2 Stark. Ev. 917.

^b 2 Camp. 390. Netter v. Pratt, Cro. Car. 396.

^c B. N. P. 264. Longford v. Eyre, 1 P. Wms. 741.

^d Doe d. Harborne v. Lewis, 7 C. & P. 474. (32 Eng. C. L.)

^e Per Tindal, C. J., in 1 Ad. & Ell. 23, (28 Eng. C. L. 21,) *infra*.

^f Bootle v. Blundell, 19 Ves. 494. 1 Cooper, 136. But see Tatham v. Wright, 2 Russ. & Myl. 17.

^g Wright v. Tatham, (in Error,) 1 Ad. & Ell. 3. (28 Eng. C. L. 11.) 3 N. & M. 268.

^h Goodtitle d. Alexander v. Clayton, 4 Burr. 2224. Lowe v. Joliffe, 1 Bl. 365. Talbot v. Hodson, 7 Taunt. 251. (2 Eng. C. L. 91.) 2 Stark. Ev. 923. Hudson's case, Skinner, 49.

racter was admitted.* Yet if the character of a *living* witness be impeached, evidence of his good character is not admissible.^b If the witnesses are dead, or abroad, or if after due inquiry none of them can be found; or if no witness can be produced except one, who is incompetent to prove the will, either from interest or otherwise, evidence of the handwriting of any such attesting witness will be sufficient.^c

Witnesses under the new act.

The statute of frauds, as we have seen required a will to be attested by three *credible* witnesses. But by the recent act, an idiot, a lunatic, or a felon may be a good attesting witness, though such witness cannot be examined to prove the due execution of the will; for a felon, or person of unsound mind is incompetent to give evidence in a court of justice. This innovation will obviously afford a great facility to fraud, without conferring any apparent advantage; for instance, a man, when drunk, may be prevailed upon to sign a will, or a sheet of paper, upon which a will may be subsequently written; an idiot, a lunatic, or a felon, may be afterwards persuaded to subscribe his name as an attesting witness; an instrument thus fabricated, may bear upon the face of it all the appearances of a will duly executed, and as such attesting witnesses will be incompetent to give evidence of its due execution, proof of their handwriting by another party, who may be totally ignorant of the fraud, will be sufficient. So that the party interested in defeating the will, may have no opportunity of ascertaining, either by the cross examination *of witnesses or otherwise, under what circumstances the instrument was signed or attested. It is worthy of notice, in connection with the preceding observations, that to establish the revocation of a will, by tearing or burning, there must, in general, be parol evidence of the intent with which such an act was done, which can only be given by a credible witness; so that, though an incompetent witness may attest a will, which is in general the result of mature deliberation, yet he cannot give evidence of the revocation of a will by destruction, which not unfrequently proceeds from a sudden transport of passion.

*1532

Primâ facie evidence of a will may be rebutted by evidence of fraud; as that the supposed will is a mere fabrication, or that it was obtained by fraud, as by the substitution of a false instrument for the one which the testator really intended to execute;^d or that it was obtained by duress; or by proof of the incompetency of the party to make a will by reason of coverture, infancy, or the want of a sound and disposing mind.^e

* Doe v. Walker, 4 Esp. 50. Bishop of Durham v. Beaumont, 1 Camp. 207.

^b Doe d. Reed v. Harris, 7 C. & P. 330. (32 Eng. C. L.)

^c 2 Stark. Ev. 923. A will thirty years old from the date proves itself, and even though it appears that one of the witnesses is alive, he need not be called, *id.* Doe d. Oldham v. Walley, 8 B. & C. 22. (15 Eng. C. L. 150.) Lord Raneliffe v. Parsons, 6 Dow. 202. Doe d. Lloyd v. Passingham, 2 C. & P. 440. (12 Eng. C. L. 209.) See *ante*, 936.

^d Doe v. Allen, 8 T. R. 147.

^e Swinburne, 72. 2 Stark. Ev. 930.

SECTION VII.

7 W. IV, & 1 VIC. C. 26.

[An Act for the Amendment of the Laws with respect to Wills.]

SEC. 1, an interpretation clause, enacts, "that the word Will. 'will,' in this act shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will, in exercise of a power, and also to a disposition by will and testament, or devise of the custody and tuition of any child, by virtue of 12 Car. II, c. 24, or 14 & 15 Car. II; and the words 'real estate,' shall extend to manors, advowsons, Real estate. messuages, lands, tithes, rents and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal and to any undivided share thereof, and to any estate, right, or *interest (other than a chattel interest) therein; and *1533 the words 'personal estate,' shall extend to leasehold estates, Personal and other chattels real, and also to moneys, shares of govern-estate. ment and other funds, securities for money, (not being real estates,) debts, choses in action, rights, credits, goods and all other property whatsoever, which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only, shall extend and be applied to several persons or things, as well as one person or thing; and every word importing the masculine gender only, shall extend and be applied to a female as well as a male."

Number.

Gender.

By sec. 2, the following statutes relating to wills are repealed: Statutes of wills, 32 Hen. VIII, c. 1, and 34 & 35 Hen. VIII, c. 5, 10 Car. I, sess. 2, c. 2. The statute of frauds, 29 Car. II, c. 3, ss. 5, 6, 12, 19, 20, 21, and 22; 7 W. III, c. 12; 4 & 5 Anne, c. 16, s. 14; 6 Anne, c. 10; 14 Geo. II, c. 20, s. 9; 25 Geo. II, c. 6, (except as to colonies); 25 Geo. II, c. 11; and 55 Geo. III, c. 192.

Sec. 3, enacts, "that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of would devolve upon the heir at law, or customary heir of him, or if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not

All property may be disposed of by will,

comprising customary freeholds and copyholds without

surrender and before admittance, and also such of them as cannot now be devised.

*1534
Estates
*pur autre
vie.*

Contingent interests.

Rights of entry; and property acquired after execution of the will.

As to the fees and fines payable by devisees of customary and copyhold estates.

have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will, if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will, or a surrender to the use of a will, should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power *contained in this act, if this act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person, or one of the persons, in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will."

Sec. 4, provides, "that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator; provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will, shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of *such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to

*1535

the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid, shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid."

By sec. 5, "when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor, of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls, that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to, for recovering and enforcing the same from or against the customary heir in case of a descent."

Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

and the lord to be entitled to the same fine, &c., when such estates are not now devisable, as he would have been from the heir in case of descent. Estates *pur autre vie*.

Sec. 6, enacts, "that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

*1536

By sec. 7, "no will made by any person under the age of twenty-one years shall be valid."

No will of a person under age valid; Nor of a feme covert, except such

By sec. 8, "no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act."

By sec. 9, "no will shall be valid unless it shall be in writing

as might now be made. Every will shall be in writing, and signed by the testator in the presence of two witnesses at one time. Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed. Soldiers' and mariners' wills excepted.

*1537
Act not to affect certain provisions of 11 G. IV & 1 W. IV, c. 20, with respect to wills of petty officers and seamen and marines. Publication not to be requisite. Will not to be void on account of incompetency of attesting witness. Gifts to an attesting witness to be void.

and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

By sec. 10, "no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity."

Sec. 11, provides, "that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act."

By sec. 12, "this act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his Majesty king George the Fourth and the first year of the reign of his late Majesty king William the Fourth, 'intituled 'an act to amend and consolidate the laws relating to the pay of the royal navy,' respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize-money, bounty-money, and allowances, or other moneys payable in respect of services in her Majesty's navy."

By sec. 13, "every will executed in manner hereinbefore required shall be valid without any other publication thereof."

Sec. 14, enacts, "that if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid."

By sec. 15, "if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate, (other than and except charges and directions for the payment of any debt or debts,) shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of, such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, not-

withstanding such devise, legacy, estate, interest, gift, or appointment, mentioned in such will."

By sec. 16, "in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof."

Creditor
attesting
to be ad-
mitted a
witness.

By sec. 17, "no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof."

Executor
to be ad-
mitted a
witness.

By sec. 18, "every will made by a man or woman shall be *revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions.)"

Will to be
revoked
by mar-
riage.
*1538

By sec. 19, "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

No will to
be revoked
by presumption.

By sec. 20, "no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

No will to
be revoked
but by another
will or codicil, or by a writing
executed like a will,
or by destruction.

By sec. 21, "no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or in some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

No alteration in a will shall have any effect unless executed as a will.

By sec. 22, "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be re-

No will revoked to be revived otherwise than by re-execution or a

codicil to
revive it.

A devise
not to be
rendered
inopera-
tive by
any subse-
quent con-
veyance or
act.

*1539
A will
shall be
construed
to speak
from the
death of
the testa-
tor.

A residu-
ary devise
shall in-
clude es-
tates com-
prised in
lapsed and
void de-
vices.

A general
devise of
the testa-
tor's lands
shall in-
clude
copyhold
and lease-
hold as
well as
freehold
lands.

A general
gift shall
include
estates
over
which
the testa-
tor has a
general
power of
appoint-
ment.

*1540

vived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

By sec. 23, "no conveyance or other act made or done subsequently *to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

By sec. 24, "every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Sec. 25, enacts, "that unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

By sec. 26, "a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will."

By sec. 27, "a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, (as the case may be,) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest *of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, (as the case may be,) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

By sec. 28, "where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

A devise without any words of limitation shall be construed to pass the fee. The words "die without issue," or "die without leaving issue," shall be construed to mean, die without issue living at the death.

Sec. 29, enacts, "that in any devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

By sec. 30, "where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication."

No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest. *1541

By sec. 31, "where any real estate shall be devised to a *trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

By sec. 32, "where any person to whom any real estate shall be devised for an estate tail, or an estate in *quasi* entail, shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person

Devises of estates tail shall not lapse.

had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

By sec. 33, "where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

Act not to extend to wills made before 1838, nor to estates *pur autre vie* of persons who die before 1838.

By sec. 34, "this act shall not extend to any will made before the 1st day of January, 1838, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, republished or revived; and that this act shall not extend to any estate *pur autre vie* of any person who shall die before the 1st day of January, 1838."

By sec. 35, "this act shall not extend to Scotland."

WITNESSES.

COMPETENCY OF A WITNESS, UNDER 3 & 4 W. IV, c. 42, s. 26.

IN an action against a master for the negligent driving of his servant, the servant is a competent witness for the defendant, under 3 & 4 W. IV, c. 42, ss. 26, 27. Parke B., "The act applies to all cases where the only interest is, that the verdict in the action would be evidence for or against the witness; here, the servant had no interest, except that the verdict might be given in evidence in an action by the master, to show the amount of damage. The act is not confined to cases in which it was before impossible to make a witness competent by a release. The object of the act was to save the expense of having a release.^a So a person under whom the defendant justifies in trespass, is a competent witness.^b So is a person who may be liable to the costs of the action as special damages.^c But a person interested in the result of a suit in equity, is not a competent witness in an issue directed in such suit; for the act removes the objection when the witness is incompetent on the ground that the verdict or judgment in the

The act does not extend to an issue

^a *Neomans v. Leigh*, 1 Murr. & Hur. 87. 2 Mees. & Wels. 419.

^b *Creedy v. Bowman*, 1 M. & Rob. 496.

^c *Pickler v. Holland*, *id.* 468.

action in which it is proposed to examine him, would be ad- directed
missible in evidence for or against him; here it is not a ver- by a court
dict or judgment that would be used against him, but a de- of equity.
cree of a court of equity—neither is this an action, but an
issue.^a

^a *Stewart v. Barnes, id. 472.*

APPENDIX.

Bill of Exceptions.

SEPARATE from the record, as to the effect of evidence in K. B. (Tidd's Forms.)

— to wit. Be it remembered, that in the term of —, in the — year of the reign of our sovereign lord *George* the Third, now king of the united kingdom of *Great Britain* and *Ireland*, &c., came *A. B.* by — his attorney, into the court of our said lord the king before the king himself at *Westminster*, and impleaded *C. D.* in a certain plea of trespass on the case upon promises; on which the said *A. B.* declared against him that, &c., (*set out the declaration and other pleadings, and proceed as follows:*) And thereupon issue was joined between the said *A. B.* and the said *C. D.* And afterwards, to wit, at the sittings of *nisi prius*, holden at the *Guildhall* of the city of *London* aforesaid in and for the said city, on — the — day of — in the — year, of the reign of our said lord the king, before the right honorable *Edward* Lord Ellenborough, chief-justice of our said lord the king, assigned to hold pleas in the court of our said lord the king before the king himself, *Edward* Law, Esquire, being associated unto the said chief-justice, according to the form of the statute in such case made and provided, the aforesaid issue so joined between the said parties as aforesaid, came on to be tried by a jury of the city of *London* aforesaid, for that purpose duly impannelled, that is to say, *E. F.* of — and *G. H.* of —, &c., (*names and additions of jury*), good and lawful men of the said city of *London*: at which day, came there as well the said *A. B.* as the said *C. D.* by their respective attorneys aforesaid; and the jurors of the jury aforesaid, impannelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the same issue; and upon the trial of that issue, the counsel learned in the law for the said

*1543 *A. B.* to maintain and prove the said issue on his part, gave in evidence that, &c. (*here set out the evidence on the part of the plaintiff, and afterwards that on the part of the defendant, and then proceed as follows:*) Whereupon the said counsel for the said *C. D.* did then and there insist before the said chief-justice on the behalf of the said *C. D.* that the said several matters so produced and given in evidence on the part of the said *C. D.* as aforesaid, were sufficient, and ought to be admitted and allowed as decisive evidence, to entitle the said

C. D. to a verdict, and to bar the said *A. B.* of his action aforesaid; and the said counsel for the said *C. D.* did then and there pray the said chief-justice to admit and allow the said matters so produced and given in evidence for the said *C. D.* to be conclusive evidence in favor of the said *C. D.* to entitle him to a verdict in this cause, and to bar the said *A. B.* of his action aforesaid: But to this the counsel learned in the law of the said *A. B.* did then and there insist before the said chief-justice, that the same were not sufficient, nor ought to be admitted or allowed to entitle the said *C. D.* to a verdict, or to bar the said *A. B.* of his action aforesaid; and the said chief-justice, did then, and there declare, and deliver his opinion to the jury aforesaid, that the said several matters so produced and given in evidence on the part of the said *C. D.* were not sufficient to bar the said *A. B.* of his action aforesaid, and with that direction left the same to the said jury; and the jury aforesaid then and there gave their verdict for the said *A. B.* and — *l.* damages; whereupon the said counsel for the said *C. D.* did then and there, on the behalf of the said *C. D.* except to the aforesaid opinion of the said chief-justice, and insisted on the said several matters, as an absolute bar to the said action; and inasmuch as the said several matters so produced and given in evidence on the part of the said *C. D.* and by his counsel aforesaid objected and insisted on as a bar to the action aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the said *C. D.* did then and there propose their aforesaid exception to the opinion of the said chief-justice, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said *C. D.* as aforesaid, according to the form of the statute in such case made and provided; and thereupon the said chief-justice, at the request of the said counsel for the said *C. D.* did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, on the said — day of — in the — year of the reign of his present majesty.

*1544

Bill of exceptions to be tacked to the record, as to a witness's being bound to answer a question tending to disgrace him in K. B. (Tidd's Forms.)

(After the end of the issue, and award of the venire facias proceed as follows:)

Which said issue, in form aforesaid joined between the said parties, afterwards, to wit, at the sittings of *nisi prius*, holden at *Westminster Hall*, in and for the county of *Middlesex* on — the — day of — in the — year of the reign of our lord the now king, before the right honorable Edward Lord Ellenborough, chief-justice of our said lord the king, as-

signed to hold pleas in the court of our said lord the king before the king himself, Edward Law, Esquire, being associated unto the said chief-justice, according to the form of the statute in such case made and provided, came on to be tried by a jury of the said county of *Middlesex*, for that purpose duly impannelled. At which day came there as well the said *A. B.* as the said *C. D.* by their respective attorneys aforesaid; and the jurors of the jury aforesaid, impannelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the said issue; and upon the trial of that issue, one *E. F.* was produced and examined upon oath as a witness, by the counsel learned in the law for the said *A. B.* in support of the said action; and upon the cross-examination of the said *E. F.* by the counsel learned in the law for the said *C. D.* the said *E. F.* was asked by the said last-mentioned counsel, whether he had not been imprisoned, upon a conviction for forging a coal-meter's ticket; whereupon the said chief-justice then and there interposed, and before the said *E. F.* had given any answer to the said question, declared and delivered his opinion, that the said *E. F.* was

*1545 *not bound to answer the said question; and the said *E. F.* thereupon then and there refused to answer the same; and afterwards, at the said trial, the said chief-justice in summing up the evidence given in the said cause to the jury aforesaid, did further declare and deliver his opinion to the said jury, that the said *E. F.*'s refusal to answer the said question threw no manner of discredit upon him the said *E. F.*; and the jury aforesaid thereupon then and there gave their verdict for the said *A. B.* and ———l. damages; whereupon the said counsel for the said *C. D.* did then and there on behalf of the said *C. D.* except to the aforesaid opinion of the said chief-justice, and insisted that the said *E. F.* was bound to answer the said question, and that his refusal to answer the same was, and ought to be considered by the said jury, as an impeachment of his credit; and inasmuch as the said several matters hereinbefore mentioned do not appear by the record, &c. (*as in the last.*)

Affidavit to put off trial on account of absence of material witness. (Tidd's Forms.)

In the King's Bench, &c.

A. B. plaintiff.
and

C. D. defendant.

C. D. of ———, the defendant in this cause, maketh oath and saith, that issue was joined in this cause, in ——— term last past, and that notice was given for the trial thereof at the ——— sitting within (*or*, at the sittings after) the said term; and this deponent further saith, that *E. F.* late of ——— is a material witness for him this deponent in the said cause, as he

is advised and believes, and that he cannot safely proceed to the trial thereof, without the testimony of him the said *E. F.* And this deponent further saith, that in consequence of the notice of trial so given as aforesaid, he this deponent caused inquiry to be made, &c. (*stating the nature and result of the inquiry made after the witness, and the time when he is likely to attend.*)

Sworn, &c.

C. D.

APPENDIX

BY THE AMERICAN EDITOR.

ACCOUNT RENDER.

	PAGE		PAGE
1. In what cases it is maintainable.		4. Of the judgment quod computet.	1555
2. Of the parties to the action.	1552	5. Of the appointment and proceedings of the auditors.	1556
3. Of the pleadings and evidence.	1553	6. Of the final judgment.	1558

ALL notice of the action of Account Render having been omitted in the foregoing pages, the American Editor has thought the work would be rendered more complete by the addition of a few notes under this head.

This action has been disused in England for more than a century. The causes of its disuse are to be found in the complication and delay which attend it, and the superior advantages afforded by a Court of Equity wherever that jurisdiction exists.^a But few modern cases illustrate its principles, and the old books and entries to which reference must of necessity be had are often contradictory and embarrassing. The more we look into the books, as was said by *Willes C. J.* in *Godfrey v. Saunders*,^b the more difficult it seems to reconcile them.

There must be a privity in deed or in law.

1.—*In what cases it is maintainable.*] It is in general necessary that there should be a privity in deed or in law existing between the plaintiff and the defendant.^c The action of account render, is founded on a contract express or implied.^d It cannot be maintained against a disseisor or wrongdoer. If a man enters on my land to his own use of his own will, account does not lie: contra, if he enters to my use.^e An exception, however, to this general rule is the case of a stranger, entering upon the lands of an infant: he is held to account for the profits.^f

^a Eq. Ca. Ab. 5. *Thompson v. Lambe*, 7 Ves. 588. The courts feel indisposed to favor this antiquated form of action when the remedy by a bill in equity may be adopted. Per *Washington, J.*, in *Couscher v. Tulam*, 4 Wash. C. C. Rep. 449.

^b 3 Wils. 113.

^c Co. Litt. 172, a. *King of France v. Morris*, 3 Yeates, 251.

^d *Whelen v. Watmough*, 15 Serg. & R. 159.

^e Bro. Accompt. pl. 8. 89. Co. Litt. 172, a.

^f Bro. Acc. pl. 8.

Privity in deed is that created by the consent of parties, and grows out of the voluntary relation, in which they have placed themselves to each other. In general an action of account render may be maintained in all cases where one man has received money as the agent of another.^a If one receive goods of another, and expressly promise to be accountable for them, or to give an account of them, case will lie if he will not account upon that promise; but upon a general bailment of goods without a particular promise to account, then the sole remedy is by account. And if one covenant or promise specially upon receipt of goods to be accountable for them, if he will not account, action upon the covenant or promise will lie, or an action of account lies upon the general receipt.^b In *assumpsit* the plaintiff declared, that the defendant having proposed to go abroad, he delivered to him a box and goods, which the defendant promised to dispose of for him and to give him an account thereof on his return. Plea in abatement, that he was the plaintiff's bailiff and had merchandised the goods; and that the plaintiff ought to have brought an action of account, and not an action on the case. The court held, that the plea could not be supported; for that the action being founded on an express promise, *assumpsit* lay as well as account, and the plaintiff had his election to adopt either of the two remedies.^c In the report of this case in *Carthew*, Lord C. J. Holt is reported to have said that he would not let the plaintiff give all the account in evidence or enter into the particulars thereof, but that he should direct his proof only as to the damages he had sustained for not accounting according to the promise, for he would not travel into an account in such actions.

Privity in deed.

Where there is a promise to account, *assumpsit* and account are concurrent remedies.

Indebitatus assumpsit for brokerage and commission, with the usual money counts and accounts stated. It appeared that the action had been brought to recover the balance of a long and running account between the parties, a merchant and broker; Lord Ellenborough nonsuited the plaintiff observing, "This is not the proper tribunal for investigating complicated mutual demands. The plaintiff should have brought an action of account, when auditors would have been appointed, who could have done justice to the parties, without occasioning any inconvenience to the court and jury."^d In a subsequent case, however, it was held that *assumpsit* would lie for the balance of an account, though the items on each side were numerous. It was an action to recover the sum of 104*l.* on a balance of ac-

Assumpsit will lie though the account may be long and intricate.

^a Per Rogers, J., in *Bredin v. Kingland*, 4 Watts, 490. *Mumford v. Avery*, Kirby's Rep. 163. See also *Hartap v. Wardlove*, 2 Show. 301. Rob. 209. Cro. Eliz. 644. 1 Roll. Rep. 259. Owen, 86. *Case v. Roberts*, 1 Holt, 500. (3 Eng. C. L. 179.)

^b Per Holt, C. J., in *Spurraway v. Rogers*, 12 Mod. 517. *Wilkin v. Wilkin*, 1 Salk. 9. *Carth. 89*. *Wetmore v. Woodbridge*, Kirby's Rep. 164.

^c *Wilkin v. Wilkin*, 1 Salk. 9. S. C. *Carth. 89*.

^d *Scott v. M'Intosh*, 2 Camp. 238. *Lincoln v. Parr*, 2 Keb. 781. See *Trials*, per Pais, 407. *Gilb. Law. Ev.* 192. *Farrington v. Lee*, 1 Mod. 269. *Sandys v. Blodwell*, W. Jones, 401. *Owston v. Ogle*, 13 East, 538.

counts. The plaintiffs were bankers, with whom the defendant had kept cash. In 1808, a balance was struck, and from that time till 1811, many sums had been paid in and drawn out without any balance having been adjusted, and it was then found that the defendant was indebted to the plaintiffs in the sum sought to be recovered by the present action. The cases of *Scott v. M'Intosh*, and *Lincoln v. Parr*, were referred to and relied on to show that account was the proper form of action, and that assumpsit would not lie. Gibbs, C. J., "A sad use is made of these *Nisi Prius* cases. I remember that case; it was a case which it was impossible to try; and there is usually a decency about counsel, which prevents them from pressing that to a conclusion, which can never be concluded. It is impossible it ever can have been decided, that if, upon dissecting an account, there appears money due upon certain items, an action for money had and received cannot be maintained. The use of the action of account is, where the plaintiff wants an account, and cannot give evidence of his right, without it; but if by subtracting the amount of six articles on the one side, from the amount of nine articles on the other, the plaintiff can make out that a balance is due to him, even of 50*l.*, it is impossible to say that an action of *assumpsit* will not lie for that balance. Here the plaintiff takes up the balance stated on the account, proceeds with his evidence through many other items, and establishes a balance due." So in the case of *Arnold v. Webb*,^b which was tried at the Taunton Spring Assizes in 1814. It was an action of assumpsit for the balance of an account. The briefs on both sides consisted of about thirty brief sheets of accounts closely written. The plaintiff with great absurdity refused to refer. Dampier, J., held, that whatever doubt might have been upon the subject a century back, the action of assumpsit for the balance due on the result of numerous mercantile transactions had been so long maintained, that it was now much too late to make any objection to it. How long is the account to be, which is to prevent assumpsit from being maintained? If assumpsit will lie for the price of one parcel of goods, or to recover one sum lent, why not for two and why not for twenty?

Account
between
copartners

Account, however, is the sole remedy by one partner against his copartner or copartners, unless there has been an express promise or covenant to account or a settlement made and a balance actually struck by mutual agreement.

The plaintiff and Foulke (of whose estate the defendant was the administrator) had been concerned in several adventures to New Orleans, upon the accounts of which, different sums appeared to be due to the plaintiff from Foulke, who had received the proceeds; and for the recovery of these sums with interest

^a *Tompkins et al. v. Willshear*, 5 Taunt. 431. (1 Eng. C. L. 145.)

^b 5 Taunt. 432, n. (1 Eng. C. L. 146.)

the action for money had and received was brought. One of the witnesses swore that two or three years before Foulke's death, the plaintiff demanded a settlement of his accounts which Foulke promised to make in a short time; but no account stated and settled by the parties was produced upon the trial, nor was there any evidence that such a settlement had ever taken place. On objection to the form of action, the point was reserved and the jury found a balance for the plaintiff. Tilghman, C. J. "It was my wish to support the action if possible, because the jury have decided on the merits of the case. But upon considering the nature of the action, and the authorities which have been cited on both sides, I am of opinion that the plaintiff cannot recover. The money received by one partner during the partnership is not received for the use of either of the partners, but of both of them. All that either partner is entitled to, is a moiety of what remains after all the partnership debts are paid. The proper remedy for one partner against the other, is by an action of *Account Render*. No case has been cited by the plaintiff's counsel to show that an action like the present can be maintained, unless the partners have settled their account and struck the balance. It is of importance that the forms of action should not be confounded. They are founded in good sense and convenience. The defendant has an interest in insisting that the proper form of action should be preserved, of which this court has no right to deprive him. It is most convenient that the partnership accounts should be settled before auditors. It would be extremely difficult, and in many cases almost impossible to settle them by a jury. I am, therefore, of opinion that the plaintiff cannot maintain this action."^a

Andrews, the plaintiff, entered into copartnership with Allen, the defendant, for five years. Before the term had expired the firm became insolvent, and made a general assignment of the stock in trade, debts, and effects of the partnership, for the benefit of their creditors who executed releases to them. The effects were sufficient, after satisfying certain debts, which had a preference by the terms of the assignment, to pay forty-one per cent. on the amount of the debt of the general creditors. The plaintiff claimed 2900 dollars 6 cents, the one half of 5800 dollars, which, he alleged, appeared by the settlement of the partnership books, to be due to him by the firm. This claim was founded on the ground of the defendant's having taken out of the firm so much more than the plaintiff, as to leave that balance in his favor on the final settlement of the partnership accounts: and he claimed also on the ground specifically of having paid into the concern a bill of exchange for 6000 dollars, which the defendant drew on the plaintiff and received the amount of before the articles of partnership. The declaration contained counts for money had and received, *insimul*

^a *Ozeas v. Johnson*, 1 Binn. 191.

computassent, and a count on the bill of exchange. Tilghman, C. J. "There is one reason against the action which is irresistible. These partners had never come to a final settlement of their accounts. And in such case the proper action is account render; assumpsit will not lie. The plaintiff alleges that the balance may be deduced from the partnership books. But that is not sufficient. An actual settlement must be made and a balance struck, *by the act of both parties*, before either can be charged in an action of assumpsit. It is very possible that the books may not show the true state of the account. There may be false entries or omissions, so that nothing certain can be deduced from calculations made by one partner, on the entries appearing on the face of the book, without the concurrence of the other. There should be a settlement in which both concur. Otherwise the proper remedy is account render."^a

Where the plaintiff and defendant entered into articles of co-partnership, which contained a covenant to account at certain times, and on a balance struck, the defendant promised to pay it, it was held by Buller, J., at Nisi Prius, that assumpsit was maintainable.^b In an action on an account stated and other common counts, it appeared that in January, 1785, the parties had entered into articles of copartnership for seven years, in which there was a covenant to settle yearly at Christmas, and to adjust and make a final settlement at the expiration of the partnership, when the stock and profits were to be equally divided and general releases given. In February, 1786, the parties came to an agreement that the defendant should carry on the business alone, and they then came to a settlement of accounts, in which several items were included not relating to the partnership account, and the balance being found in favor of the plaintiff for £140, the defendant promised to pay it; held that assumpsit would lie.^c

Where the partnership relates to a single item, assumpsit will lie.

However, where, though there is a technical partnership, it relates only to a single item, and the equal division of the gain thereby made, the action of account render is not essential, but assumpsit may be maintained.

As where the defendant became the purchaser of certain real property under an agreement with the plaintiff and two others, that the purchase should be for the joint benefit of the four, that the defendant should make sale of the property again at the highest price which could be obtained for it, and divide the advance, whatever it might be, equally between them. The plaintiff brought an action of assumpsit for his share, alleging that the defendant had gained an advance of eight hundred and fifty dollars, the one fourth of which, according to the agreement between them, he was bound to pay to the

^a Andrews v. Allen, 9 Serg. & Rawle, 241.

^b Moravia v. Levy, 3 Term Rep. 483, *notis*.

^c Foster v. Allanson, 3 Term Rep. 479.

plaintiff. Kennedy, J. "Admitting that a technical partnership existed, of the correctness of which I very much doubt, there was but a single item to be settled; the partnership, if such it may be called being at an end. The whole scope of the agreement contemplated only the purchase of a single item of property and the sale of it again and an equal division of the gain thereby made between them. It cannot be pretended that there is any necessity for the intervention of auditors to state and settle an account when the whole matter consists merely of the purchase of a single tract of land, and the sale of it again: and the question to be answered is, how much, if any thing has been gained by the purchase and resale, after deducting the expenses attending it? This can be ascertained with as much facility and certainty by a jury, as by auditors, and the verdict of the jury at once closes and puts an end to all further controversy. Where the transaction is of such a nature as to render the calling in of auditors altogether unnecessary, the action of account render may very well be avoided; for the prosecution of such an action is not only attended with more than double the costs and expenses but more than double the delay of assumption. This principle was adopted by the Supreme Court of New York in *Musier v. Trumphone*.^a Where the plaintiff and defendant agreed to burn lime on the share, one was to fill the kiln with stone; and the other to burn it and furnish the necessary wood for that purpose, the lime to be equally divided between them; and although it was held that this created a technical partnership, yet that an action at law in assumption might be maintained by the one against the other for the balance due him and growing out of the partnership transaction, inasmuch as there was but a single item to liquidate."^b

Account render will lie against an attorney at law for money received for his client.^c Where personal estate is devised to *A.* during her widowhood remainder over, account will lie against *A.* and her husband, to recover the property limited over.^d

This action is also sustainable upon a privity in law, as against a guardian in socage.^e

But it did not lie at common law for one joint-tenant or tenant in common against his companion, although he had taken the whole profits to his own use, unless he had been appointed bailiff to render an account.^f But now, by statute 4 Anne, c. 16, s. 27, an action of account may be maintained by one joint-tenant or tenant in common, his executors or administrators, against the other as bailiff, for receiving more than his share or proportion, and against the executors or administrators of such joint-tenant or tenant in common.

Account will lie against an attorney: so against a tenant for life of personality Privity in law. Tenants in common.

^a 5 Wendall, 274.

^b *Brubaker v. Robinson*, 3 Penn. Rep. 295.

^c *Bredin v. Kingland*, 4 Watts, 490.

^d *Griggs v. Dodge*, 2 Day's Cases, 28.

^e Co. Litt. 172, a.

^f Co. Litt. 200, b. *Griffith v. Willing*, 3 Binn. 317.

Executors At the common law executors in general could not maintain account on a cause of action accruing to the testator, for it rested in privity. Nor did it lie against the executors of the accountant. These rules however had some exceptions. An account might have been maintained at common law by the executors of merchants, and it lay also for the king, against executors.^a So if executors consented to settle an account, they were liable to an action of debt for the balance.^b

But the statute Wm. II, 13 Edw. I, st. 1, c. 23, gave this action to executors and the statute 31 Edw. III, st. 1, c. 11, to administrators.^c The statute 25 Edw. III, st. 5, c. 5, has extended the same remedy to the executors of executors. By st. 4 Anne, c. 16, s. 27, an action of account may be maintained against the executors or administrators of a guardian, bailiff or receiver.

This action will not lie, however, by one executor against another, for the possession of the one is the possession of the other.^d

Infant.
Husband
and wife.
Joint de-
fendants.

2.—*Of the parties to the action.*] The action like other actions arising ex contractu must be brought by and against the parties to it. It will not lie against an infant.^e It lies against husband and wife where she was liable to account *dum sola*.^f Joint factors or co-bailiffs are like co-obligors and are answerable for one another for the whole; for if only the factor, who actually embezzles the effects, was answerable, it would be the same as if that one were only trusted. Every consignment to two factors jointly imports a consent by the consignor for them to trust one another; but both are answerable and accountable for the whole, though they have a right by the contract to deliver over to one another.^g

In account render by one partner against two, charging them as bailiffs and receivers, the plaintiff must show a joint liability on the part of the defendants to render an account to the plaintiff.

Where one brought an action against two and it appeared that the parties were partners, but that it was not a house of partnership, consisting of two parties, the plaintiff one and the defendants another, but that it was a partnership of three, one holding one half, and each of the others one fourth: Duncan, J., said, "whatever may have been the inconveniences of this action, it is not chargeable with those pointed out; for each party interested may have his separate action for his own interest, against every one who has received his money and recover from him that portion which has come into his hands unaccounted for by him. I cannot agree with the learned

^a Litt. s. 125. Co. Litt. 89, b. 90, b. 2 Inst. 403. F. N. B. 117. 11 Rep. 90, a.

^b F. N. B. 267.

^c Co. Litt. 89, b. 2 Inst. 404.

^d F. N. B. 271. 4to. ed. n. (f.)

^e Co. Litt. 88, b. 172, a.

^f Vin. Abr. B. pl. 4, n.

^g Godfrey v. Saunders, 3 Wils. 73.

judges of Connecticut,^a that when there are more than two partners, the action of account render will not lie." "If two men are intrusted with the goods of another, to merchandise, a confidence is placed in *both*. They accept the trust jointly, and jointly confide in one another. The receipt of one is the receipt of another, and therefore it is a joint receipt. Both are liable, for by implication each has undertaken to account for the other; and that is the very marrow and substance of *Godfrey v. Saunders*.^b Saunders, who survived Solomons his co-partner, was held responsible for his acts and embezzlements; because, as the court said, they were co-obligors, and answerable for one another for the whole."^c

3.—*Of the pleadings and evidence.*] Where the declaration is against a receiver, it must state particularly by whose hands the money was received.^d Where these particulars cannot be stated, the defendant should be charged as *bailiff*.^e Where the declaration is defective in this respect it must be taken advantage of, before final judgment.^f If two joint merchants occupy their stock goods and merchandise in common to their common profit, one of them naming himself a merchant shall have an account against the other naming him a merchant, and shall charge him as the receiver of the moneys of him the said *B.* from whatever cause and contract to the common profit of them the said *A.* and *B.* coming as by the law merchant he can reasonably show.^g Between partners it is sufficient for the plaintiff to charge the defendant generally, with the receipt of the money to their joint benefit, and having proved a receipt by the hands of any one of the persons mentioned in the declaration, he is entitled to a general verdict upon the first issue.^h

Declaration.
Bailiff and
Receiver.

Partners.

Tenants in
common.

In the action between tenants in common, the declaration should state, that the parties are tenants in common, and that the defendant has received more than his share, for the action of account under the statute differs from the action at common law in this, that at common law a bailiff is not only answerable for his actual receipts, but for what he might have made out of the land, without his wilful default. But by the plain words of the statute, a tenant in common, who is sued as bailiff, is answerable only for so much as he has actually received, more than his just share. Again, the auditors at common law could administer an oath only in two particular cases. Here they may examine the parties on oath. Unless, therefore, it appear in the declaration, in what capacity the defendant is

^a *Buch v. Hotchkiss*, 2 Conn. Rep. 425.

^b 3 Wils. 73.

^c *Whelen v. Watmough and Another*, 15 Serg. & Rawle, 153.

^d *Bishop v. Eagle*, 11 Mod. 186.

^e *Walker v. Holyday*, 1 Com. Rep. 272.

^f Vin. Abr. Account, F. pl. 9, *marg.*

^g Co. Litt. 172, a.

^h *James v. Browne*, 1 Dall. 339.

sued, the auditors cannot tell how he is to account, or whether they are to examine him on oath, for if he is charged as bailiff generally, the plaintiff will be nonsuited, unless he can prove the defendant was actually his bailiff at common law.^a

Pleas. The defendant may plead in bar, that he was never bailiff or receiver, that he has fully accounted, a release or any matter which shows that he was never accountable.

The plea must answer the whole time laid. When the plaintiff charges the defendant as receiver from such a time to such a time, the defendant must answer the entire time precisely. As where defendant pleaded that the 20^l. demanded by the plaintiff was delivered to him to pay over to such persons as *A. B.* and *C. D.* should think fit, and that they awarded that he should deliver it over to one *H. &c.*; without this that he was receiver: held ill, because it did not answer the whole time laid.^b

The defendant may plead infancy.^c So he may plead he was the plaintiff's servant, to drive his plough or keep his cattle, for then he was never accountable: so an award of all matters between the parties: so that the plaintiff accepted the defendant's bond for the same sum.^d So the statute of limitations.^e

Double pleas. In a case where the defendants pleaded, never bailiffs or receivers, and fully accounted, judge Duncan said, "never bailiff or receiver is the general issue because it goes to the root of the action: fully accounted, is like the plea of payment added to the general issue, *non est factum*, or *non assumpsit*. The plea of payment added to *non est factum*, does not admit the deed: it puts that in issue. So, never bailiff or receiver denies accountability. It is no more than saying, 'We never were joint bailiffs and receivers; but if you prove we were, then we will show that we have fully accounted.'"^f

If the party is once chargeable and accountable, he cannot plead any matter of discharge in bar, except a release or fully accounted.^g The exceptions proceed on this ground, that a release and the having fully accounted are total extinctions of the right of action, of which the court is to judge.^h

Evidence. Where the declaration charged the defendant as bailiff of certain goods belonging to the plaintiff, to make profit of for the plaintiff and as receiver of certain sums by the hands of *A. B.* and *C.*, being the money of the plaintiff, to whom he was to render an account; and had given in evidence sums of money received by the hands, not of the persons mentioned in the declaration, but of a person not named there; and these sums, so received not the money of the plaintiff, but the money

^a *Wheeler v. Horne*, Willes, 208. *Irvine v. Hanlin*, 10 Serg. & Rawle, 219.

^b *Southcote v. Rider*, T. Raym. 57.

^c 1 Vin. Abr. Account, N. pl. 18. T. Raym. 57. Rast. Ent. 16.

^d *Ibid.* 1 Rol. Ab. 191. *Taylor v. Page*, Cro. Car. 116.

^e See *Perkins v. Turner*, 1 Har. & M'Hen. 400.

^f *Whelen v. Watmough*, 15 Serg. & Rawle, 159.

^g 3 Wils. 113, 114.

^h 1 Brownl. 24, 25.

of the partners and received on joint account; it was held, that the *allegata* and *probata* were totally at variance with each other, and the plaintiff was nonsuited.^a

In this action between partners, if the plaintiff prove that a partnership existed—that the defendant was acting partner—and that he received any of the sums of money from any of the persons mentioned in the declaration, he will be uniformly obliged to render an account.^b

In account against the defendant as receiver by the hands of *A.* it is sufficient for the plaintiff to prove that *A.* directed the defendant to borrow of another to pay the plaintiff; that the defendant borrowed accordingly and that *A.* gave bond to the lender.^c

If the defendant plead that he was never receiver, he cannot give in evidence a bailment to deliver to another person, and that he has delivered accordingly: for though this special matter prove that he is not accountable, yet as, upon the delivery, he was accountable conditionally; (viz., if he did not deliver over,) the evidence does not support the plea.^d

A release cannot be given in evidence under the plea that the defendant was never receiver.^e

Account. Plea fully accounted. Plaintiff consigned to defendant a cargo of goods to sell on commission, and the agreement of defendant bound him to return those that should remain unsold. The defendant sold a part, and delivered to the plaintiff an account current in which he debited himself with all the goods and credited the sales, leaving a large balance of goods unsold and unreturned. The plea is not maintained; the account rendered not amounting to a full accounting, so long as a part of the goods remained unsold and unreturned. The plaintiff could not have maintained an action of *insimul computasset* for the balance of the account.^f

4.—*Of the judgment quod computet.*] There are two judgments in this action. The first is that the defendant do account. The second is a final judgment for the arrearages.

The form of this judgment, as appears by the record in *Godfrey v. Saunders*,^g is as follows:—"therefore it is considered, that the defendant account with the plaintiff of the time aforesaid in which he (the defendant) and the said *S. S.* were the bailiffs of the plaintiff and had the care and administration of the aforesaid goods and merchandises, &c., to be merchandised and made profit of for the plaintiff; and the defendant in mercy, &c., because he hath not before accounted, &c."

Form of the judgment *quod computet.*

^a *Jordan v. Wilkins*, 2 Wash. C. C. Rep. 482.

^b Per M'Kean, C. J., in *James v. Browne*, 1 Dall. 340.

^c *Harrington v. Dean*, Hob. 36.

^d 2 Roll. Abr. 683, F. pl. 1.

^e *Willoughby v. Small*, 1 Brownl. 24.

^f *Read v. Bertrand*, 4 Wash. C. C. Rep. 556.

^g 3 Wils. 89. Co. Ent. 46, b. Ra. Ent. 17.

This judgment is interlocutory only and no writ of error lies upon it.^a

The defendant pleaded 'that he had fully accounted; and issue being joined thereon, the jury found for the plaintiff, and assessed damages and costs; and judgment was entered accordingly and execution issued. The court on motion set aside the judgment and execution, observing that the judgment was wrong, for it ought to have been only a preliminary judgment to account; and they compared the irregularity in this case to the irregularity of signing final before interlocutory judgment.^b

Bail to account. 5.—*Of the appointment and proceedings of the auditors.* After the judgment quod computet, the defendant gives special bail to account, to which if he does not do it voluntarily he is compellable by the process of *capias ad computandum*.^c

Appointment of auditors. In England the auditors are generally the prothonotaries or principal officers of the court.^d In Pennsylvania they are usually three attorneys of the court.

The rule for the appointment of auditors is absolute in the first instance.^e

Powers of auditors. The auditors without application to the court may enlarge the time for investigating the account. They are the proper judges whether the parties have been guilty of delay or not. If they find them remiss or negligent, they must certify to the court that they will not account.^f

By stat. 4 Anne, c. 16, s. 27, the auditors are empowered to administer an oath, and examine the parties touching the matters in question; and for the trouble in auditing and taking such account, shall have such allowance as the court shall judge reasonable to be paid by the party, on whose side the balance of account shall be.

Pleadings before the auditors. On the subject of pleading before auditors, the following rules are laid down in the books: 1. Whatever can be pleaded in bar to the action must be so pleaded, and cannot be pleaded before the auditors.^g As where in an action of account upon the receipt of divers sums, the defendant pleaded *never received*, and found against him; and being adjudged to account before auditors he pleaded, that after the receipt and before the action brought, he had put himself in arbitrament, for all trespasses, debts, accounts and actions, &c. who arbitrated, that he should

^a Metcalf's Case, 11 Rep. 38, a. Beidler v. Zeigler, 1 Penn. Rep. 135.

^b Hughes v. Burgess, Ca. Temp. Hardw. 394. Andr. 19.

^c Reeves v. Gibson, 1 Lev. 300. Chester v. Hunt. C. B. M. 13 Geo. II, cited in 1 Selw. N. P. 5.

^d Godfrey v. Saunders, 3 Wils. 73. Smith v. Smith, 2 Chitty, 10. (18 Eng. C. L. 231.) Archer v. Pritchard, 3 Dowl. & Ry. 596. (16 Eng. C. L. 179.)

^e Archer v. Pritchard, 3 Dowl. & Ry. 596. (16 Eng. C. L. 179.)

^f Williams v. Lee, 1 Mod. 42.

^g Taylor v. Page, Cro. Car. 116. S. P. 3 Wils. 113. Newbold v. Sims, 2 Serg. & Rawle, 317.

pay 10*l.* only in discharge, &c., which he paid accordingly, whereupon it was demurred and without argument adjudged for the plaintiff; for this arbitrament before the action ought to have been pleaded in bar of the action, which being omitted, he hath lost the advantage thereof and shall never plead it before the auditors.^a 2. Nothing can be pleaded before the auditors contrary to what has been before pleaded, and found by verdict; because it would introduce either contrary verdicts, which would perplex the court or two verdicts of identically the same kind, which would be nugatory and absurd.^b

If the matters offered by the defendant in discharge of the plaintiff's demands, are disputed by the plaintiff, he may either demur or take issue before the auditors. If there are more points of dispute than one, there may be a demurrer or an issue on each, which are to be certified by the auditors to the court, and then the matters of law will be decided by the court, and the issues in fact by a jury, after which the account will be finally settled by the auditors, according to the result of the trials.^c

If either party desires to join an issue, and the auditors refuse permission, the court will set the matter to rights. So if the auditors conduct themselves with any manner of impropriety, to the injury of either party, redress may be had on application to the court.^d

It will not be inferred from the judgment *quod computet* that the defendant has received all the precise sums and at the precise times mentioned in the declaration. He will have to account for all that he has received and will be allowed every item in discharge which he can make out as fairly chargeable against the plaintiffs.^e

Upon a judgment to account, all articles of account, though incurred since the writ, shall be included, and the whole brought down to the time, when the auditors make award of the account.^f Should a demand arise subsequent to the report, the plaintiff will not be barred from prosecuting the same in another action, or by a bill in equity.^g

There is a distinction in the books between a bailiff and a receiver. The former is entitled to an allowance for his reasonable expenses, while the latter is not. A bailiff is defined to be one who has charge of lands, goods and chattels of another to make the best profit for the owner, and to have his reasonable charges and expenses deducted, and is accountable for the profits he reasonably might have made. A receiver is where one receiveth money to the use of another, to render an ac-
allowances before auditors.

^a Taylor v. Page, Cro. Car. 116.

^b Godfrey v. Saunders, 3 Wils. 114.

^c Croussillat v. M'Call, 5 Binn. 433. 1 Browne, 266. Bull. N. P. 128. Wilson v. Wilson, 2 Southard, 791. In Connecticut the decision of matters of fact rests with the auditors. Parker v. Avery, Kirby, 353. Spencer v. Usher, 2 Day, 116.

^d Croussillat v. M'Call, 5 Binn. 463.

^e Newbold v. Sims, 2 Serg. & Rawle, 317. James v. Browne, 1 Dall. 339.

^f Per Lord Mansfield, in Robinson v. Bland, 3 Burr. 1086.

^g Washington, J., in Couscher v. Tulam, 4 Wash. C. C. Rep. 442.

count. This distinction, however, is not universally true, as it does not apply confessedly to partners. An attorney at law sued in account, is to be considered as a bailiff, but he has no right to an allowance for commissions or professional compensation; as an attorney at law who collects money, and neglects or refuses to pay it over until sued for it, has no claim for compensation; the debt being no nearer collection than before, and it being in fact only the substitution of one debtor for another.^a

A tenant in common, unlike a bailiff at common law, is chargeable under the statute only with his actual receipts, and is entitled to an allowance for his charges and expenses about the common property.^b

The auditors should set out and return the account.^c If upon the account as returned, a balance is found due from the plaintiff to the defendant, it seems judgment cannot be entered in favor of the defendant for the sum so found, but it is well settled that the defendant may support an action of debt against the plaintiff, for the amount of the sum in which he was found in surplusage by the auditors.^d

6.—*Of the final judgment.*] A final judgment is for the arrearages of the account, and damages.

Damages. It seems to be questionable whether, in all cases, damages are recoverable; but it is clear, that if the defendant resists the plaintiff's claim by pleading, or where an increase is received by a receiver *ad merchandisandum*, there shall be judgment for damages.^e In actions sounding merely in damages, the rule is that the plaintiff cannot recover more than the damages laid in the declaration, but this rule is not applicable to account render in which the main object of the action is to obtain an account and judgment for the arrearages, and in which damages are given only *ratione interplacitationis*. A plaintiff in account render may therefore have judgment for the arrearages to a greater amount than the damages laid in the declaration.^f

If the defendant make default after interlocutory judgment at the day assigned by the auditors, final judgment shall be entered for the sum demanded by the plaintiff in his declaration.^g The same judgment was entered on full consideration upon an insufficient plea entered before auditors, which was adjudged bad on demurrer. In this case the form of the judgment was as follows: "Therefore, it is considered, that the plaintiff do recover against the defendant the aforesaid, 12,000*l*."

Form of
final judgment.

^a Co. Litt. 172, a. *Bredin v. Kingland*, 4 Watts, 420.

^b *Irvine v. Hamlin*, 10 Serg. & Rawle, 220. *Wheeler v. Horne*, Willes, 206. *Anderson v. Greble*, 1 Ashmead, 136.

^c *Finney v. Harbeson*, 4 Yeates, 514. *Couscher v. Tulam*, 4 Wash. C. C. Rep. 442.

^d *M'Call v. Croussillat*, 3 Serg. & Rawle, 7. 5 Binn. 433. See *Dickerson v. Dickerson*, 2 Root, 121.

^e Bac. Abr. Appendix, 20. *Collet v. Robston*, 2 Leon, 118.

^f *Gratz v. Phillips*, 5 Binn. 564. ^g *Williams v. White*, Cro. Eliz. 806.

(the sum laid in the declaration) for the value of the goods and merchandises aforesaid, and also 278*l.* 7*s.* 8*d.* for his damages as well by reason of the interpleading aforesaid, as for his costs and charges by the plaintiff in and about his suit in that behalf expended, to the said plaintiff by the court here adjudged with his assent; and that the said defendant be in mercy, &c."^a

^a Godfrey v. Saunders, 3 Wils. 73. There is a complete record of an action of Account in this case, which, according to Tilghman, C. J., (5 Binn. 568,) throws more light on the subject than any case in modern times. To the careful study of that case, therefore, the student is particularly recommended, for a more full understanding of this action.

INDEX.

ABANDONMENT; see INSURANCE.

nature and operation of. 1167. 1173.

effect of, acceptance of. 1169. when it will not avail. 1170.

when notice of, should be given. 1172.

ABATEMENT;

plea of, for non-joinder of co-partner, when not available. 535.

may be pleaded, when all parties interested do not join in suing. 105. 585.

the non-joinder of a secret partner cannot be pleaded in. 106. *n.*

the non-joinder of co-executors may be pleaded in. 997.

plea of non-joinder in, is bad where the statute of limitations applies. 1257.

plea of, in replevin. 1329.

ABSENTING; see BANKRUPTCY.

from home, when an act of bankruptcy. 219.

ACCEPTANCE;

of a bill of exchange. 419.

presentment for. 416.

form of. 419.

of foreign bills, mode of. 420.

qualified or conditional. 423. partial or varying. 425.

place of payment, "not elsewhere." 425.

by what party it should be made. 427.

cannot be revoked. 429.

supra protest. 431.

of goods, what is sufficient within the statute of frauds. 1054.

ACCEPTOR;

of a bill of exchange should know handwriting of drawer. 59.

liability of; is the principal debtor. 427.

supra protest. 432.

how he may be discharged. 420.

ACCORD AND SATISFACTION;

must be specially pleaded. 132.

when a sufficient answer to an action. *Id.* 699.

plea of accord, which is executory only, not sufficient in covenant. 699.

ACCOUNT STATED;

when a count on, may be sustained. 98.

with a trustee, a married woman, an infant. 102.

ACKNOWLEDGMENT; see LIMITATIONS, STATUTE OF. 3.

ADJUSTMENT; see INSURANCE.

definition and effect of. 1180.

ADMINISTRATOR; see EXECUTORS.

who is entitled to be. 962.

pendente lite; durante absentia. 967.

interest of, relates back to death of intestate. 973.

ADMINISTRATION;

cum testamento annexo, when and to whom granted. 963.

de bonis non; when granted. 964.

durante minore etate. 965.

ADMISSION;

on the record, effect of. 480.

ADULTERY; see CRIM CON.

a husband is not liable to support a wife guilty of. 1098.

ADVERSE POSSESSION;

what constitutes, so as to bar a right of entry. 831.
 where parties claim under the same right it is not. *Id.*
 sixty years' will bar the crown. *Id.*
 or even twenty years' if there be not a judgment in intrusion. 837.
 of copyhold lands. 832.
 of mortgaged premises. 834.
 by encroachment on waste lands. 835.
 will be negatived, when. 837.
 a person having, for 20 years, has a sufficient title to maintain the ejectment. 845.

ADVOWSON; see SIMONY.

purchase of, when void. 957.

AFFIDAVIT;

of service of a declaration in ejectment, requisites of. 899.

AGENT; see PRINCIPAL.

when liable to his principal, for money had and received. 47, 48.
 not liable for money *bona fide* paid to principal. 49. 51.
 when liable for goods sold. 96.
 when he may sue and be sued. 105.
 may draw, accept or indorse a bill of exchange. 346. 352.
 his appointment and authority. 347, *et seq.*
 cannot delegate his authority. 349. 866.
 may give notice to quit, if duly authorised. 855.
 who is, within the statute of frauds. 1050. 1063.
 when a wife will be presumed to act as husband's. 1092.
 employed to sell a horse has authority to warrant. 1505.

ALIEN;

a bill in favor of an alien enemy will support a promise. 35.
 capacity of a wife to contract when her husband is an. 1101.
 who is considered an alien enemy; incapacities of. 1127.

ALTERATION see WORK. BILLS AND NOTES. COVENANT.

in a bill or note, effect of. 388. 393.
 will avoid a deed, or bond, or covenant. 656. 758.
 will avoid a policy of insurance. 1151.

AMENDMENT;

of the record at trial. 1309.

ANCIENT; see LIGHTS.

case lies for injury, to an ancient house. 561.

ANIMALS;

case lies for injuries by. 552.

ANNUITY;

when set aside for informality, money paid on may be recovered. 60.

APPEARANCE;

in ejectment, notice of time of. 886.
 of defendant or his landlord in ejectment; proceedings thereon. 905.
 when to be entered; how to be made. 907.

APPRAISEMENT;

of distress, when and how to be made, 810. 812.

APOTHECARY;

statute relating to practice of, and decisions thereon. 85.
 proof of certificate of. 86.
 may charge for attendance or medicine, but not for both. 86.
 must prove his qualification under non-assumpsit in an action on his bill. 129.

APPORTIONMENT or RENT;

when there may be an. 919. when there cannot be an. 726.

APPROPRIATION; see PAYMENTS.**ARREST; see PRIVILEGE.**

malicious, what will justify. 1437.

ARRESTS AND DETENTION OF PRINCES; see INSURANCE. LOSS.

what constitutes a loss by. 1161.

ASSAULT; see TRESPASS; BATTERY.

what constitutes an; trespass for. 1409.

ASSETS; see EXECUTORS.**ASSIGNEES; see BANKRUPTCY.**

of bankrupt actions by. 283. against. 301.

when notice of matter intended to be disputed must be given to. 303.

when they may sue and be sued on covenants of assignor. 670.

ASSIGNMENT; see NEW. BREACH.

of debts by arrangement. 52.

of all a trader's property to particular creditors is an act of bankruptcy. 224.

unless it be for a valuable consideration. 226.

of a part, only, is not an act of bankruptcy. 230.

of bankrupt's property to assignees how effected, and what will pass by. 241.

of breaches in a bond. 762.

of a bail bond, how to be made. 774.

of an interest in land must be in writing. 1012.

ASSUMPSIT;

when it lies in general. 1.

when a party may waive a tort and sue in. 4.

when the only remedy. 5.

will not lie when the party has a higher security. 5.

unless the security be collateral only, or void. 6.

must be founded on a sufficient consideration. 7.

will not lie on contracts in contravention of the statute law. 8.

or founded in fraud. 19. or in furtherance of immorality. 21.

or against public policy. 23.

2. *What consideration* is sufficient to support. 27. See **CONSIDERATION.**

3. Special and general. 43.

will not lie but where debt would lie. 44.

4. When a count for *money had* and received may be maintained. 45.

money, or something agreed to be considered *as money*, must have been received. 46. 62.

money received on a bill not due, insufficient. 47.

will lie against a stakeholder for a deposit. 48.

or against an agent. (See **AGENT.**) *Id.*

there must be a privity of contract between plaintiff and defendant. 50.

it will lie where the defendant consents to hold money for the use of the plaintiff. 52.

money paid under a mistake of facts, may be recovered on this count. 54. 59.

but not, if paid under a mistake of law or with a knowledge of the facts. *Id.*

money paid on a consideration which failed, when recoverable. 60.

when paid by fraud or duress. 62.

if paid under compulsion of law it is not recoverable. 64.

money paid on an illegal contract, when recoverable. 66.

5. When a count for money paid may be maintained. 69.

will lie for money paid by compulsion of law. 71.

but not for money paid through negligence or breach of duty. 76. nor in furtherance of an illegal object. *Id.*

6. Will lie for work and labor. 77.

7. For goods sold and delivered. 88. See **GOODS SOLD.**

8. On an account stated. 98.

9. The declaration in. 103.

10. The pleadings. 125.

the new rules. 126.

non assumpsit, when a good plea in an action on a bill. 128. what may be given in evidence under a plea of *non assumpsit*. 127. 128.

accord and satisfaction. 132.

infancy. 134.

payment. 145.

set-off. 152.

tender. 161.

payment of money into court. 171.

11. Replication. 176.

de injuria when good. *Id.*

12. Assumpsit by assignees of a bankrupt. 285.

the declaration. 291.

ASSUMPSIT, continued.

- the pleadings. 295.
- 13. Assumpsit on a bill of exchange. 485.
 - the declaration. 488.
 - the pleadings. 494.
- 14. Against a carrier. 530.
- 15. When a concurrent remedy with case. 549.

ATTESTATION; see WILL.**ATTORNEY;**

- agreement by, on Sunday, in settling client's affairs, not void. 16.
- not entitled to compensation for attending a trial as a witness. 48.
- liable for money paid by a defendant, where he has commenced an action without authority. 63.

- of action on bill of. 178.
- requisites to entitle him to costs. *Id.*
- practising in the name of another. 179.
- when he may abandon a suit before its termination. 180.
- need not proceed unless supplied with expenses. *Id.*
- must have taken out certificate and be retained. 181.
- duty of to client. 183. if services worthless, cannot recover. *Id.*
- when a bill must be signed and delivered. 184.
- what are taxable items. 185, 187.
- in what cases a bill need not be delivered. 187.
- what is a sufficient signing and delivery of a bill. 189.
- how a bill may be proved. 191.
- what is a good defence to an action on bill. 192.
- privilege of. 193.
- liability of, on their undertakings. 194.
- liability for negligence. 195.
- liabilities to third parties for misconduct. 201.
- the declaration in actions against. 200.
- what words spoken of, are actionable. 1356.

AUCTIONS;

- puffing at, avoids the sale. 20.

AUCTIONEER;

- is the agent of the buyer and seller within the statute of frauds. 1050. 1062.

AUTRE DROIT;

- property which bankrupt has in, will not pass to assignees. 259. 303.

AVERAGE; see INSURANCE.

- what constitutes a general. 1176.
- what constitutes a particular. 1178.

AVOWRIES AND COGNIZANCES;

- plea of, in replevin. 1331.

AWARD;

- assumpsit will lie upon. 4.
- liability of an executor upon. 991.

B.**BAIL;**

- case will lie for maliciously holding to. 1290.

BAIL-BOND; see BOND.**BAILIFF;**

- when distraining for rent, should have the warrant of the landlord and be sworn. 807.

BANK-NOTES; see BILLS OF EXCHANGE.

- when a good tender. 164. 338.
- definition of. 338.

BANKER;

- liable in assumpsit or case, if, being in funds, he dishonors the check of a customer. 2.
- bound to know the signature of a customer. 59. 551.

BANK OF ENGLAND;

- statutes for the protection of the monopoly of. 345.

BANKRUPT; see BANKRUPTCY.

- contracts against the policy of the bankrupt law, void. 24.
- who may be. 204 to 209.
- actions by. 314.
- may bring action to dispute the commission. 316.
- actions against. 317.
- dealings with, before bankruptcy, when protected. 267.
- dealings with, after an act of bankruptcy. 268.
- when he may dispute the commission. 316.
- is not liable on a promise, unless in writing, to pay a debt discharged by certificate. 330.

BANKRUPTCY;

- when a set off is allowed in. 159.
- 1. What constitutes an act of. 209, *et seq.* 217, 218.
 - departing the realm. 209. 215.
 - departing from dwelling-house. 217.
 - otherwise absenting. 221.
 - beginning to keep house. 220.
 - denial to creditors. 219.
 - fraudulent conveyance. 224.
 - intent to delay creditors. 218. 233.
 - remaining in prison. 211. 234.
- 2. Petitioning creditor's debt. 235. 238.
- 3. Assignment of the bankrupt's property. 241. statutory provisions. *Id.*
 - what passes to assignees by. 241, *et seq.*
 - goods in possession by order and disposition. 244.
 - with consent of the true owner. 251.
 - choses in action. 257.
 - goods in possession in *autre droit* do not pass. 259.
 - nor for a specific purpose. 262.
- 4. Protected dealings and transactions. 267. 272.
 - payments without notice of an act of. 268, *et seq.*
 - transfer of goods, by sale or otherwise. 269. 272.
 - partnership payments. 272.
 - fraudulent preference. 273.
- 5. Notice of, what sufficient. 277.
- 6. Judgment-debts, how far entitled to preference. 278.
- 7. Actions by assignees. 282.
- 8. Actions against assignees. 301.
- 9. Evidence in such actions. 304.
 - who may be a witness. 311.
- 10. Actions by and against bankrupt. See **BANKRUPT.**
- 11. Certificate. 317.
 - effect of certificate. 330. 324.
 - what debts may be proved under the commission 321.
 - second bankruptcy. 333.

BANNS; see MARRIAGE.

- when marriage without publication of, will be void. 1458.

BARRATRY; see INSURANCE.

- definition of; what constitutes a loss by. 1163.

BARRISTER; see COUNSEL.

- cannot sue for fees. 83.

BASTARDY; see ILLEGITIMACY.

BATTERY; see ASSAULT. TRESPASS.

- what constitutes a. 1410.

BILL OF EXCHANGE;

- 1. Accepted by a party in his ordinary calling, on *Sunday*, void. 16.
- definition of. 333. 336.
- of the parties to. 339. 356.
- an agent who indorses for his principal is not liable thereon. 352.
- of the form and requisites of. 360.
- must be for the payment of money. 362.
- payment of must not depend on a contingency. 363.
- must not be for less than 20*s.* *Id.*

BILL OF EXCHANGE, continued.

- should describe the payee. 367.
- unless it be made payable to order, or to bearer. 369.
- when the parties are fictitious persons. *Id.*
- the drawer's name should appear in. 370.
- place of payment. 371.
- value received. 372.
- date. 373.
- effect of memorandum. 373, 4.
- the usual form of. 375.
- 2. The stamp. 376.
- stamp on foreign bill. 383.
- construction of stamp act; decisions on. 385.
- effect of not being duly stamped. 387.
- 3. Alteration in, effect of. 388.
- 4. How transferable. 395.
- by indorsement. 396. 401.
- by delivery. 399.
- transfer by trustee. 402.
- transfer by a bankrupt. 403.
- liability of the party who transfers. *Id.* 405.
- indorsement may be on a blank stamp. 408.
- transfer of an over-due bill. 409.
- transfer after payment. 412.
- rights of the holder of a forged. 414.
- 5. Presentment for acceptance, when to be made. 416.
- mode of presenting. 418.
- 6. Acceptance of an inland, form of. 419.
- form of accepting foreign bills. 420.
- what amounts to acceptance of. 421, 2.
- qualified or conditional acceptance. 423.
- partial or varying acceptance. 425.
- acceptance payable at a particular place. 425.
- may be made on a blank stamp. 426.
- by what party a bill should be accepted. *Id.*
- liability of acceptor. 427.
- when he will not be liable to the holder. 428.
- acceptance once completed cannot be revoked. 429.
- how an acceptor may be discharged. *Id.*
- acceptance *supra protest*. 431.
- 7. Presentment for payment. 434.
- should be made within a reasonable time. 435.
- days of grace. 437.
- mode of calculating the time when a bill becomes due. 438.
- when payable at usance. *Id.*
- at what hour presentment should be made. 439.
- by what party and at what place presentment should be made.
- consequences of not duly presenting. 443.
- 8. Notice of dishonor. 443. See NOTICE.
- general rules respecting. *Id.*
- 9. Protest. 458.
- 10. Effect of indulgence. 453.
- indulgence to accommodation acceptor. 460.
- taking additional security. 461.
- discharge by bankruptcy of acceptor. 463.
- what operates as a waiver of a discharge. *Id.*
- 11. Lost bills. 464.
- rights of the holder of a lost bill. *Id.*
- proper course for the loser to pursue. 466.
- his remedy. 469. cannot maintain an action on. *Id.*
- a promise to pay it is not binding. 470.
- loser may recover, when not indorsed. 471.
- loss of one half before due. 472.
- 12. Consideration for. 472.
- when want of consideration is no defence. 475-7.
- plaintiff not bound to prove, till his title is impeached. 479.
- 13. Usury. 481. 484.

BILL of EXCHANGE, continued.

- 14. Action on. 484.
of the different forms of action on. *Id.* 715.
- 15. Witnesses, competency of. 500.
- 16. Interest on. 504.

BILL of EXCEPTIONS. 1542.**BOTTOMRY and RESPONDENTIA; see INSURANCE.**

- definition of. 1214.
- partners cannot lend on. 1216.
- upon ships trading to India. *Id.*

BONA NOTABILIA;

- what constitutes; effect of as to probate. 968.

BOND; see DEBT; ADMINISTRATION.

- 1. Of the nature and requisites of. 730.
condition, form of. 731.
stamp on. 733.
construction of. 736.
- 2. Extent of the liability of the obligor. 740.
the penalty is the debt in law. 741.
what payments will discharge the obligor. 541.
when proceedings in an action on, will be stayed. 742.
when a previous demand is not necessary before action on. *Id.*
the extent of obligor's liability on an indemnity bond. 743.
- 3. Of the liability of a surety, when there is a change in the situation of the obligee. 744.
when there is a change in the principal. 745.
surety to tax collectors, and parties appointed to office. 747.
giving time to principal, effect of. 750.
contributions among sureties. 750.
- 4. Liability of the heir, and personal representatives. 757.
- 5. When void and illegal. 757. 753.
in restraint of trade. 638. 755.
simoniacal. 755. 757.
- 6. What will discharge. 758.
- 7. assignment of breaches in action on. 760.
- 8. Pleadings. 767. 753.
- 9. Bail-bond, nature and requisites of. 770.
when sheriff may take. 771.
when it may be put in in suit. 773.
render of principal will not discharge. *Id.*
assignment of, and proceedings on. 774.
extent of liability of the bail. 776.
declaration in debt on. 777.
pleadings. 779.
pleas of *comperuit ad diem*, taken for ease. 780.
- 10. Replevin bond, proceedings upon. 1344.

BREACH;

- avowment of, in declaration. 123.
- in an action of covenant. 691.
- assignment of, in debt on bond. 760. 765.
- when assignment of, is unnecessary. 763.

BRICKS;

- under size, price of cannot be recovered. 13.

BROKER; see AGENT.

- must give copy of charges for making a distress. 812.
- is the agent of the buyer and seller within the statute of frauds. 1063.
- authority of to pledge goods. 1497.

BUILDINGS;

- when case will lie for injuries to. 561.

BUTTER;

- price of cannot be recovered, if not packed as the statute directs. 13.

C.

CARRIER;

1. Common duties and responsibilities of. 507. 520. -
by land. *Id.* liable even in case of robbery or fire. 509.
exempt from liability, by act of God or king's enemies. 508.
2. By water, duties of. 511.
commencement of risk. 512.
termination of risk. 513.
whether bound to deliver goods. *Id.* 514.
liability of, and statutes relating to. 515.
3. The carrier's act, 11 Geo. IV. & 2 W. IV. p. 517.
decisions under it. 522.
liability of, in case of gross negligence. 525.
what is a receiving house within the act. 526.
4. Without reward, liability of. 527.
5. Privilege of; right of lien. 528.
6. Actions against. 530.
of the party who may sue. 531.
7. Of passengers, duties and liabilities of. 537.
8. Delivery of goods to, is not sufficient within the statute of frauds. 1054.

CASE, ACTION ON;

- when it will lie in general. 541. 550.
when a concurrent remedy with trespass. 547.
when a concurrent remedy with assumpsit. 549.
when a concurrent remedy with covenant. 551.
advantages of. 552.
lies for injuries by dangerous animals. *Id.*
for a nuisance. 551.
for obstructing ancient lights. 558.
for injuries to buildings. 561.
for diverting a watercourse. 564.
for disturbance of a right of way. 571.
of the parties to an action on the. 584. 586.
the declaration. 592.
the pleadings. 599. 600.
lies for an apportionment of rent. 719.
for a pound breach. 815.
for an excessive distress. 816.
against a sheriff for taking insufficient pledges in replevin. 1347.

CATTLE; see ANIMALS.**CERTIFICATE; see BANKRUPTCY.**

- operates as a discharge of bankrupt's debts. 317. 320.
how to be pleaded. 318. 319.
when it bars a debt not proveable under the commission. 324.
foreign. 331. what will avoid. *Id.* 332.
when it bars debts proveable under a second commission. 333.
when a judge must grant, for immediate possession in ejectment. 943.
of a judge at Nisi Prius respecting costs. 1315.

CHECK; see BILLS OF EXCHANGE.

- definition of. 338.
when it need not be stamped. 379. *n.*
must not be post-dated. 407. *n.*
a party taking, when overdue, does so at his peril. 411.

CHOSSES IN ACTION;

- will pass to assignees of a bankrupt. 257.
the husband acquires a qualified property in his wife's. 1083.
negotiable instruments are. 1084.

CHURCHWARDENS; see OVERSEERS.

- may maintain ejectment for parish lands, when. 847.

COHABITATION; see PART COHABITATION.

- is presumptive evidence of husband's assent to wife's contract. 1090. 1098.
subsequent avoids a deed of separation. 1123.
not evidence of marriage in an action of crim. con. 1456.

- COLLOQUIUM;**
use of in a declaration for a libel or slander. 1381.
- COMMONER;**
may distrain the lord's cattle, when. 791.
when he may distrain the cattle of another commoner. *Id.* 792.
- COMPENSATION;**
to professional men, 83.
- COMPETENT;** see **WITNESS.**
- COMPULSION** or **LAW;**
when money paid by, may be recovered back. 64.
- CONCEALMENT;**
of a material fact will avoid a policy of insurance. 1205. 1231.
- CONCURRENT ACTS;**
what; rules respecting, in pleading. 116. 683.
- CONDITION;** see **BOND.**
precedent, nature of, rules for discovering. 113. 682.
of a bond. 731.
recital in, effect of. 737. 740.
if impossible to be performed, obligor is discharged. 758.
- CONSENT RULE;**
nature of. 908.
- CONSIDERATION;** see **FORBEARANCE;** **ASSUMPSIT.**
what sufficient to support assumpsit. 7. 27, *et seq.*
it need not be adequate in point of value. 27.
giving up a suit where the law is doubtful, is sufficient. 30.
past consideration when sufficient. 36.
the mere delivery of a thing sufficient. 38.
performance of a duty is not. 39.
impossible, not. 40.
may be bad in part and good for remainder, but if part be illegal the whole is void. 41.
must move from the plaintiff. 42.
or his agent 43.
when illegal money paid on, may be recovered. 66.
statement of, in the declaration. 111.
for a bill or note, what sufficient. See **BILLS.**
when want of is no defence. 475.
proof of, 479.
necessary, to support a contract in restraint of trade. 642.
not necessary, to sustain a deed in or covenant. 634. n.
for a promise, must be in writing under the statute of frauds. 1030.
but it need not be stated in express terms, if it can be inferred it is sufficient. 1034.
- CONSIGNEE;**
of goods is in general the proper party to sue the carrier. 530.
- CONSOLIDATION;**
of actions, when the court will order, in ejectment. 909.
rule, in actions on policies of insurance. 1221.
- CONSTRUCTION;** see **COVENANT.** **BOND.**
of covenants. 613.
of bonds. 756.
of policies of insurance. 1153.
of policies against fire. 1236.
- CONTINGENCY;**
payment of a bill or note must not depend on. 363.
the statute of frauds does not extend to contracts, the performance of which depends on.
1045.
- CONTRACTS;** see **FRAUDS, STATUTE AGAINST.**
simple, express, and implied, definition of. 2.
in contravention of the statute law cannot be enforced. 8.
infringing on the revenue laws. 16.
against morality or public policy, void. 21. 23.
when a party has derived a benefit from, he cannot recover money paid on. 61.
when rescinded, money paid on may be recovered. 62.

CONTRACTS, continued.

when money paid on an illegal contract may be recovered. 66.
 how to be stated in a declaration. 106.
 when positive, act of God shall not excuse non-performance of. 116. s.
 how rescinded. 1508.

CONTRIBUTION;

among sureties, when. 74. 750.
 none among joint tort-feasors. 75.

CONVERSION;

what constitutes, so as to subject a party to an action of trover. 1477 to 1480.
 by a bailee. 1478. the fact of, is a question for the jury. 1479.
 a servant may be guilty of. 1481.
 a demand and refusal is evidence of. 1482.

CONVOY; see INSURANCE.

a warranty to depart with, when complied with. 1186.

COPYHOLD; see EJECTMENT.

evidence in ejectment by devisee of. 936.
 evidence in ejectment by the lord of the manor. 940.

CORN;

sheaves of, and growing crops may be distrained for rent. 800.

CORPORATIONS;

when they may sue and be sued in assumpsit. 7.
 may be parties to a bill or note. 344.
 are liable in trover for a conversion by their agent. 1489.

CORRECTION;

of a servant, apprentice, or child, is a good defence in trespass for an assault. 1416.

COSTS;

when one party to a bill may recover from another costs of an action. 71.
 attorney's bills for. 187. See ATTORNEY.
 treble, recoverable in an action for pound breach. 815.
 security for, must be given by plaintiff in ejectment, if an infant or abroad. 911.
 payment of, in case of a second ejectment, 912.
 how recoverable, who is liable to, in ejectment. 946.
 in trespass for mesne profits. 953.
 liability of executor for. 1009.
 judge's certificate respecting, under 43 Eliz. 1315.
 under 22 & 23 Car. II. 1318.
 under the malicious trespass act. 1321.
 in replevin. 1341.
 in an action for words and for a libel. 1400.

COUCHANCY; see LEVANCY.**COUNSEL; see BARRISTER.**

practice as to hearing, at Nisi Prius. 1302.
 who is to begin. 1303.
 right of, to reply. 1307.
 should not assist a party who conducts his own cause. 1308.
 words spoken by, in conducting a cause, are privileged. 1370.

COVENANT;

definition of. 602.
 express, what. 603. implied. 606. qualified. 608.
 construction of. 613.
 personal, what is. 618.
 which runs with the land. 619.
 for quiet enjoyment. 622.
 not to assign without a license. 626.
 personal representatives are bound when named in. 630.
 what operates as a waiver of a breach of. 632.
 when void and illegal. 634.
 who are incapable of being bound by. 635.
 when binding, though nothing passes. 637.
 in restraint of trade. 638.
 to deal with particular persons. 644.

COVENANT, *continued*.

respecting the exercise of particular trades. 646.
 what will discharge. 648.
 discharged by the act of God. 650.
 discharged by operation of law. *Id.*
 by acts or omission of covenantees. 652.

COVENANT, ACTION OF.

when it will lie. 657.
 joinder of parties. 659.
 by the heirs. 665.
 against the heir and devisee. 666.
 by executors and administrators. 667.
 against executors, &c. 668.
 by assignees. 670. of a bankrupt. 289.
 against assignees. 671.
 when a concurrent remedy with case. 551.
 the declaration. 673.
 the pleadings. 695. 699.
 evidence. 701.
 the judgment. 705.

CREDIT;

party to whom given liable for goods sold. 97.

CREDITORS;

compounding with some, in fraud of others, void. 20, 21.

CRIM. CON.;

trespass or case lies for. 1455.
 plaintiff must prove the marriage. 1466. See **MARRIAGE**.
 the fact of adultery. 1461.
 and give evidence of damages. *Id.*

CRITICISMS;

of literary works are privileged. 1370.

CROPS; see CORN; GROWING.

case will lie for excessive distress of. 818.

CROWN; see ADVERSE POSSESSION.

debts entitled to priority. 977.

CUSTOM OF LONDON;

a married woman may trade on her own account by the. 1101.

D.

DAMAGE FEASANT;

beasts may be distrained for rent. 794. 802.
 avowries and cognizances for, in replevin. 1334.

DAMAGES;

in trespass, cannot be severed. 1431.
 in crim. con. 1461. in trover. 1500.
 in an action of warranty of a horse. 1507.

DEBT;

1. Action of.
 by assignees of a bankrupt. 289.
 on a bill of exchange. 484. 710.
 when it lies in general. 709.
 lies on records. 710. on statutes. 711.
 does not lie where the demand cannot easily be reduced to a certainty. 712.
 lies against executors and administrators. 712. 1002.
 the declaration in debt on simple contract. 713.
 the pleadings. 714. 715.
2. Debt for rent, when it lies. 716.
 for use and occupation. 718.
 the declaration. 720.
 the pleadings. 723.
3. Debt for double value. 726.
 does not lie against weekly or quarterly tenants. 727.
4. Debt for double rent, when it lies 729.

DEBT, continued.

- 5. Debt on bond. 730. See **BOND**.
the declaration. 760.
the pleadings. 761.
- 6. Debt on bail bond. 770.
the declaration. 777.
the pleadings. 779.

DEBTS; see EXECUTORS.

- rules of priority in payment of, where the estate of deceased is insolvent. 977.
- when an executor not observing such rules may be answerable out of his own estate. 986.

what, proveable under a commission of bankrupt, 891.

DECEIT; see FRAUDULENT REPRESENTATIONS.**DECLARATION; see ASSUMPSIT; CASE; COVENANT; DEBT; and other forms of action.**

- in actions by assignees. 391.
- in an action on a bill of exchange. 488.
- in actions against carriers. 534.
- in an action for diverting a watercourse. 569.
- in an action for an interruption of a right of way. 383.
- in an action on the case. 592.
- in ejectment. 878.
- service of, what sufficient. 869. See **SERVICE**.
- in actions, by executors or administrators. 998.
- in actions against executors. 1004.
- on a policy of insurance. 1217.
- in an action for malicious prosecution. 1295.
- in replevin. 1328.
- in an action against a sheriff for taking insufficient pledges. 1348.
- in an action of slander. 1377.
- in trespass for an assault and battery. 1412.
- in trespass to real property. 1446.
- in trover. 1490.
- in an action on a warranty of a horse. 1509.

DEED; see COVENANT.

- how proved. 701. evidence of execution is dispensed with if it be twenty years old, or produced by opposite party. *Id.*
- when secondary evidence of is admissible. 704.
- of separation, between husband and wife. 1191.

DEFAMATION; see SLANDER.**DEFEASANCE;**

- in a bond, what, 731.

DE INJURIA; see REPLICATIONS.

- when a good replication in assumpsit. 176.
- when not. 177.
- may be pleaded in replevin. 1335.
- when proper in trespass. 1418.
- when not proper. 1420. what it puts in issue. *Id.* 1421.

DELIVERY;

- transfer of a bill or note by. 399.
- of goods by a carrier, what is a sufficient. 513.
- of goods, within the statute of frauds. 1054.

DEMAND AND REFUSAL;

- evidence of a conversion. 1482.
- but the refusal must be unqualified. 1483.
- by and of whom the demand should be made. 1486.

DEPENDENT AND INDEPENDENT COVENANTS;

- definition of; rules respecting, in pleading. 679. 688.

DEPOSITIONS;

- taken before commissioners of bankrupts, when conclusive evidence of trading, &c. 306.

DETINET;

- when executors must be sued in, for rent. 722.

- DETINUE;**
 action of, when it lies. 781.
 the declaration, pleadings, &c. 783.
- DEVASTAVIT; see EXECUTORS.** 12.
- DEVIATION; see INSURANCE.**
 what constitutes. 1192, 3.
 may be justified by necessity. 1197.
- DEVISE; see WILL.**
- DEVISEE;**
 may be sued on the covenant of the testator jointly with the heir. 667.
 liability of, on bond of testator. 751.
- DESCENT CAST;**
 definition of, will not take away a right of entry. 830.
- DISCLAIMER;**
 of lessor's title, operates as a forfeiture. 876.
 what acts of tenant amount to. 877.
- DISCONTINUANCE;**
 of an estate, definition of. 829.
 will not defeat a right of entry or action for the recovery of land. 830.
- DISHONOR; see BILL OF EXCHANGE. NOTICE.**
 of a bill of exchange, when notice of, should be given. 443.
- DISTANCE;**
 how to be measured; by the shortest way of access, or as the crow flies. 641. n.
- DISTRESS;**
 the only remedy for a poor rate, and for composition-money, in lieu of statute duty. 741.
 nature of, and causes for which it may be made. 785.
 who may make. 787.
 how to be avoided, by payment or tender of rent. 792.
 taking a bond for rent will not waive a right to make. 793.
 what may be distrained. 794.
 things privileged from. 795.
 things conditionally privileged. 797.
 things in actual use are privileged. 798.
 so are things in the custody of the law. 799.
 fixtures. *Id.*
 sheaves of corn, and hay may be distrained. 800.
 in what place it should be made. 802.
 in case of fraudulent removal. 803.
 at what time it should be made. 805.
 in what manner to be made. 807.
 how it should be disposed of. 809.
 impounding. *Id.*
 sale of. 810.
 second distress. 813.
 rescous, or pound breach. 814.
 remedy for a wrongful. 815.
 for an excessive. 816.
- DITCHES; property in.** 1451.
- DORMANT PARTNER; see PARTNERS.**
 holder of a bill on which the firm is liable need not sue. 357.
 will not be liable on bills after his retirement. 359.
- DOUBLE; see RENT; DEBT.**
- DRAWER;**
 name of should be inserted in a bill of exchange. 370.
- DRIVING;**
 rule of, on the high road. 539.
- DRUGS;**
 if sold for an illegal purpose, price of cannot be recovered. 13.
- DURESS;**
 money paid by, recoverable. 62.

E.

EARNEST;

what constitutes an, within the statute of frauds. 1059.

EASEMENT; see **WAY; LIGHTS.**

not sufficient to maintain trespass.

EJECTMENT.

1. History and nature of action of. 819.
2. For what things it will lie.
what will be a sufficient description of the thing for which the action is brought. 824.
3. What title is necessary to support. 828.
plaintiff must have a legal title and a right of entry. 829.
how a right of entry may be lost. *Id.*
by adverse possession. 831.
4. Who may bring this action. 840.
a mortgagee. *Id.* lord of the manor 841. a copyholder. 842. a widow entitled to free bench, a guardian, and an assignee. 843. a tenant by *elegit*. 844. personal representatives, devisees, and persons having adverse possession for twenty years. 845. corporations, 846. persons. 847. trustees 848.
5. When an actual entry is necessary to sustain. 853.
6. When notice to quit must be given; requisites of notice. 857. *et seq.* See **NOTICE.**
7. The declaration. 878.
notice to appear, and the requisites thereof. 886.
time of appearance. 887.
service of the declaration. 889.
affidavit of service. 889.
judgment by default. 902.
8. Appearance of the defendant, and proceedings thereupon. 905.
consent rule, notice of. 907.
9. Consolidation of actions.
10. When the court will stay the proceedings. 911.
11. Evidence of the plaintiff's title. 921.
evidence in ejectment by landlord against a tenant. 922.
by the heir. 931.
by devisee. 936.
evidence in, by an execution creditor. 937.
by a mortgagee. 938.
by an executor or administrator. 939.
by assignee. *Id.*
by a person. 940.
in case of copyholds. *Id.*
who may be a witness in. 941.
12. Of the trial, judgment, and execution. 942.
13. Costs. 946.
14. Writ of error. 948.
when a court of equity will restrain a party from bringing further ejectments. 449.
15. Trespass for meane profits. 949.

ELECTION;

debt lies against returning officer at, for penalties for not delivering copy of the poll to a candidate. 711.

ENTRY;

how right of, may be barred. 829.
when necessary to be made before ejectment. 859.

ENTRY AND EVICTION;

a good plea in covenant for nonpayment of rent. 698.
and also in debt. 723.

ERROR;

writ of, how to be brought in ejectment. 948.

ESCROW;

definition of. 732.

EVICION; see **ENTRY.**

EVIDENCE; see **BANKRUPTCY**; **COVENANT**; **DEBT**; **EJECTMENT**; and other forms of action,
 bill or note not duly stamped cannot be received in. 387.
 in actions against carriers. 536.
 in ejectment. 921.
 in ejectment by landlord against a tenant. 922.
 by the heir. 931.
 hearsay and reputation. *Id.* 932.
 to establish illegitimacy. 934.
 in trespass for mesne profits. 951.
 in actions by executors. 1007.
 in actions on policies of insurance. 1223.
 where the statute of limitations is pleaded. 1257.
 in an action for malicious prosecution. 1298.
 in replevin. 1337.
 in an action against a sheriff for taking insufficient pledges in replevin. 1348.
 in an action for slander, or libel. 1393.
 in mitigation of damages. 1398.
 in trover. 1500.
 of a will. 1529.

EXCEPTIONS;
 bill of. 1542.

EXCISE;
 contracts in violation of regulations, may be enforced. 18.

EXECUTION; see **JUDGMENT**.
 suing out in ejectment 944.
 when a judge may certify for a speedy. 1321.

EXECUTORS; see **ADMINISTRATOR**.
 1. Property of testator in possession of, does not pass to assignees. 260.
 2. When they may sue and be sued on the covenants of the testator. 667.
 3. May now be sued in debt. 712.
 may maintain debt for rent. 717.
 when they must be sued in *detinet* and when in *debt*. 722.
 4. May distrain for rent due in lifetime of testator. 791.
 5. Who may be. 955.
 6. *De son tort*. 957. liability of. 960.
 7. Of their interest in the estate of the deceased. 972.
 cannot maintain an action before probate. *Id.*
 how they should dispose of the estate of the deceased. 975.
 may give a preference among creditors of an equal degree. 982.
 may retain for their own debts. 983.
 8. Of their liability in respect of the acts of the deceased. 984.
 of their liability in respect of their own acts. 977. 987.
 9. When answerable *de bonis propriis*. 989.
 when liable as assignees for rent. 990.
 when personally liable in an award. 991.
 10. Actions by. 993.
 the declaration, in actions by. 998.
 the pleadings and evidence. 1101.
 11. Actions against.
 the declaration. 1004.
 the pleadings. 1005.
 12. Admission of assets, what will amount to *devastavit*. 1008.
 liability of, for costs. 1009.
 judgment. 1011.
 13. Promise by, to pay debts of deceased, must be in writing. 1022.

EXTORTION;
 money paid through, when recoverable. 62 to 64.

F.

FACTOR; see **AGENT**.
 when claims upon may be set off in an action by the principal. 158.
 authority of, to pledge goods of principal. 1497.
 when debt of, may be set off against demand of principal. 158.

FALSE IMPRISONMENT;

when trespass lies for. 1432.

when it will lie against public officers for. 1434.

when it will not lie against a judge of a court of record for. 1435.

the pleadings in trespass for. 1437.

FEME SOLE;

when a married woman may be considered as. 1100. 1104.

FERRY;

case lies for disturbance of. 544.

FIAT; see BANKRUPTCY..

proceedings under, how proved. 310.

FINE;

an entry must be made to avoid, in order to maintain ejectment. 854.

FIRE; see Loss.

insurances against. 1233.

FIXTURES;

will pass to the assignees of a bankrupt, when. 255.

are privileged from distress. 799.

when trover will lie for. 1475.

FORBEARANCE;

of a suit, a sufficient consideration to support assumpsit. 31.

to enforce a *fi. fa.*, sufficient. *Id.*

for what time. 32.

to sue upon a cognovit. 33.

to sue where the party is not liable, not sufficient. 33.

FOREIGN BILL; see Bills and Notes.

what shall be deemed. 384. stamp on. 383.

when dishonored should be protested. 458.

in the place in which it is made payable. 459.

FOREIGN JUDGMENT;

assumpsit will lie upon. 6.

FOREIGNERS;

not bound by our revenue laws. 17.

FORFEITURE; see DISCLAIMER.

evidence in ejectment for. 925.

waiver of, a good defence in ejectment. 929.

when not taken advantage of, remainder-man has a new right. 1278.

of a replevin bond, what amounts to. 1344.

FORGERY;

no title can be obtained through. 414.

of a bill or note, what is. 415.

when money paid on a forged instrument may be recovered back. 58.

FRAUD;

transactions founded in, void. 19.

money paid by, recoverable. 62.

will avoid a covenant. 636.

FRAUDS;

statute against. 1015.

1. Sec. 1 & 2. What leases must be in writing. 1016.

assignment or surrender of interest in land to be in writing. 1019.

2. Sec. 4. Promise by an executor to be in writing. 1021. 2.

promise to answer for the debt of another must be in writing. 1023. 1024.

and be founded on a sufficient consideration. 1031.

agreements in contemplation of marriage must be in writing. 1038.

so must contracts for the sale of lands. 1039. 1040.

so must agreements not to be performed within a year. 1044.

unless the performance depends on a contingency. 1045.

3. What is a sufficient note or memorandum in writing. 1046.

4. Contracts for the sale of goods above the value of 10*l.* must be in writing. 1050.

unless there be a delivery and acceptance of part. 1054.

FRAUDS, continued.

- or earnest be given. 1059.
- who is an agent within the statute. 1062.
- 5. Note or memorandum of the contract. 1059, 1060.
- 6. The declaration and pleadings. 1065.

FRAUDULENT PREFERENCE; see BANKRUPTCY.

- payments made by a bankrupt with a view to, are void. 273.
- what constitutes. *Id. et. seq.*
- a fraudulent conveyance, or gift, is an act of bankruptcy. 224. 232.

FRAUDULENT REMOVAL OF GOODS; see DISTRESS.

- right of landlord to distrain in case of. 803.

FRAUDULENT REPRESENTATIONS;

- when a contract is vitiated by. 21.
- respecting the credit of another, case will lie for. 1067. 1074.
- but they must be false. 1071. and in writing. 1074.
- so if made respecting the subject matter of a contract. 1077.

FUNERAL EXPENSES;

- liability of executors for; allowance for where the estate is insolvent. 975. 977.
- husband is liable for expenses of his wife's funeral. 72.

G.

GAMING;

- securities for money won, or lost at, to be considered as given for an illegal consideration. 481.

GIFT;

- a fraudulent gift by a trader is an act of bankruptcy. 232.

GOD;

- act of, relieves carriers from liability. 508.
- will discharge a covenant. 650.

GOODS SOLD AND DELIVERED;

- when an action will lie for. 88.
- not until time of credit has expired. 86.
- dishonored bills given for. 90.
- to maintain this action the goods must have been delivered. 90.
- when the plaintiff may waive a tort and sue for. 91.
- special agreement respecting. 92.
- what may be recovered under this count. *Id.*
- the value of the goods. 93.
- when the vendee may return the goods. 93.
- if inferior in quality, vendee may retain, and set up inferiority as a defence. 94.
- of the parties to this action, principal and agent. 96.
- what contracts for the sale of goods, are within the statute of frauds. 1051.
- what is a sufficient delivery and acceptance of goods, within the statute. 1054.

GROSS NEGLIGENCE;

- necessary, to support an action against a gratuitous bailee. 38. 527.
- carrier guilty of, forfeits protection of the carrier's act. 525.
- party guilty of, in taking a lost bill, formerly could not sue on it. 465.
- but now he may recover, unless there be *mala fides*. 466.

GROWING CROPS, OR PRODUCE;

- contracts for sale of, must be in writing. 1039.
- distinction between contracts relating to natural and cultivated produce. 1041.

GUARANTEE; see FRAUDS, STATUTE OF.

- assumpsit is the only remedy on. 5.
- cannot be the subject of a set-off. 154.

H.

HEARSAY EVIDENCE; see EVIDENCE.

- when admissible. 931.

HEDGES AND DITCHES;
property in. 1451.

HEIR; see **COVENANT**.

when he may sue, and be sued, on the covenants of his ancestor. 665.
liability of, on bond of ancestor. 751.
evidence in ejectment by. 931.
is barred by an adverse possession of forty years. 1281.

HIGHWAY; see **NUISANCE**.

when case lies for obstructing. 556.

HOLDER; see **BILLS OF EXCHANGE;** **GROSS NEGLIGENCE**.

of a bill or note, *bona fide*, is entitled to payment thereof. 466, 467.

HORSES; see **WARRANTY**.

sale of, on Sunday. 14.

when stolen, property is not altered by sale in market overt. 1469.

HOUSE; see **ANCHIENT**.

HUSBAND AND WIFE;

1. Of the husband's rights in respect of his wife's property. 1082.
how he may defeat her right by survivorship. 1085.
2. She may have a separate property, through the intervention of trustees. 1086.
a secret disposition of her property, pending a treaty of marriage, is void. 1088.
3. Of his liability in respect of her contracts during cohabitation. 1089.
he is liable only for necessities supplied on his credit. 1090.
unless when she acts as his agent. 1092.
he is not liable for money lent to her to pay for necessities. 1093.
4. Of his liability for her contracts, after separation. 1095.
he is liable for necessities, unless he pays her a suitable allowance. 1096.
but he is not liable if she has committed adultery, or deserted him without sufficient cause. 1098.
5. When she is to be considered as a *feme sole*, in respect of contracts. 1100.
if she has separate property it will be liable for her contracts. 1104.
she may pass an interest in freehold property, if her husband has absconded. 1105.
6. Of her privilege from arrest. *Id*.
7. Actions by, when they must join. 1107.
of their joinder in actions *ex delicto*. 1112.
effect of their joinder, where he might sue alone. 1116.
consequences of misjoinder. 1117.
8. Actions against, when they must be sued jointly. 1118.
actions *ex delicto*. 1119.
consequences of misjoinder. 1121.
9. Of deeds of separation.

I.

ILLEGAL; see **CONTRACT;** **ASSUMPSIT;** 4, 5; **USURY;** **COVENANT**.

money paid in furtherance of an illegal object cannot be recovered back. 76.
covenants, what are. 634, 5, n.
bonds, what are, 752.
voyage, cannot be insured. 1199.
trading with an enemy without a license is. 1201.

ILLEGITIMACY; see **PARENT**.

proof of. 934.

when evidence of parents is admissible to establish. 935.

IMMORALITY;

contracts in furtherance of, void. 21.

IMPOSSIBLE CONSIDERATION;

will not support a promise. 40.

IMPRISONMENT; see **FALSE**.

INDEMNITY;

against the consequences of a crime, cannot be the subject of an action. 23.
giving a bond of, when a sufficient consideration to support *assumpsit*. 28.
a promise to indemnify will support *assumpsit*. 31.

INDEMNITY BONDS; see BONDS.

nature of; liability of the obligor. 742.

INDORSEMENT; see BILLS OF EXCHANGE.

of a bill or note, effect of. 396.

restrictive, in blank, 398.

by a person who has no right, confers no title. 401.

may be on a blank stamp. 406.

INDORSER;

liability of. 403 to 405.

effect of laches of. 407.

INDUCEMENT;

in a declaration, is not traversable. 1378.

when it must be proved. 1379.

INDULGENCE; see BILLS OF EXCHANGE.

to a party to a bill or note, effect of. 457.

an agreement to give, must be binding, in order to discharge other parties. 460.

an assent to, is a waiver of discharge. 463.

INFANT; see PARENT.

should appear by guardian, or *prochein ami*, in an action. 135.

not liable for contracts, unless for necessaries. *Id.*

nor even for necessaries supplied on credit, if he has means of paying for them. 137.

or unless he ratifies them after that age. 138. 340.

what are necessaries for. 135, 136.

may be a partner. 137. 341.

contracts by, for the purposes of trade, are void. 139. 341.

contracts for his benefit are binding. 140.

liability of, for torts. 141.

not liable on a bill or note. 340.

unless after age he promises, in writing, to pay it. *Id.*

infancy is a personal privilege. 341.

distinction between *void* and *voidable* contracts by. *Id. n.*

contracts by, not affected by the statute of limitations until six years after age. 1241.

rights of, in respect of realities, not affected, until ten years after age. 1281.

cannot make a will. 1513.

INUENDO;

meaning and use of, in a declaration for slander or a libel. 1385.

INSOLVENT;

not liable on a promise to pay a debt incurred before his discharge under the insolvent act. 34. n.

INSTALMENT;

when *assumpsit* is the only remedy for. 5.

INSURANCE;

1. Of the nature of the contract of, and the parties thereto. 1125.

2. What may be a subject of. 1129.

smuggled goods or seamen's wages cannot. 1131.

3. Of the interest which the insured must have in the subject matter of. 1133.

4. Re-insurance, double. 1138.

5. Of the requisites of a policy of. 1139.

the common memorandum. 1146. the stamp. 1147.

6. Valued and open policies. 1152.

7. Construction of policies. 1153.

liability of the underwriters. *Id.* 1155.

8. Of losses by perils insured against. 1155. See *LOSS*.

total loss and abandonment. 1165.

of the nature and effect of abandonment. 1196. 1173. See *ABANDONMENT*.

stranding. 1173. general average. 1176. particular average. 1178.

adjustment. 1180.

9. Warranty, what constitutes; different kinds of. 1181. See *WARRANTY*.

seaworthiness. 1189. deviation. 1192. illegal voyage. 1199.

10. Misrepresentation and concealment. 1203.

11. Return of premium.

12. Bottomry and respondentia. 1214.

13. Action on the policy, declaration and pleadings. 1217.

consolidation rule. 1221.

INSURANCE, continued.

evidence. 1223.

14. Insurance upon lives. 1228.

15. Insurance against fire. 1233.

INTEREST;

on a bill or note, how to be computed. 504, 5.

on a bond. 740, 41.

a person insured must have an, in the subject of insurance. 1133.

arrear of, not to be recovered for more than six years. 1285.

I. O. U.; see BILLS OF EXCHANGE.**IRELAND;**

not beyond the seas, within the statute of limitation. 1249. 1282.

but still beyond the seas within 4 Anne, c. 16. s. 19. *Id.***J.****JOINDER;**

of parties in actions by executors. 996.

of husband and wife, when plaintiffs. 1107.

when defendants. 1118.

JOINT AND SEVERAL;

covenants, actions on; parties to. 659.

JUDGMENT;

by default, in an action on a bill of exchange. 499.

in an action of covenant. 705.

by default, in ejectment. 902.

against casual ejector, will be set aside, when. 903.

in ejectment, effect of, how to be entered up. 942.

is never final in ejectment. 949.

is evidence only against the parties who are privies thereto. 952.

is not conclusive, unless pleaded by way of estoppel. 951.

recovered, may be pleaded in actions against executors. 1006.

pro bonis propriis, of assets, *quando*. 1011.

according to the right and justice of the case. 1314.

in replevin. 1339.

JUDGMENTS;

against a bankrupt, when preferred to other debts. 278.

what proveable under the commission. 326.

not docketed, rank as simple contract debts. 978.

JUSTIFICATION;

plea of, in an action of slander. 1390.

defence of master, wife, husband, property is a good, in trespass for an assault. 1410.

all material allegations in a plea of, must be proved. 1417.

other justifications in trespass. 1454.

L.**LACHES;**

what constitutes, in the holder of a bill or note. 436.

effect of. 442.

in the obligee of a bond, effect of 749.

LANDS;

contracts for sale of, must be in writing. 1039.

LANDLORD; see TENANT.

when he may defend, in ejectment against his tenant. 905. 909.

when he may proceed under 1 Geo. IV, c. 87. against a tenant who holds over. 918.

evidence in ejectment by, against tenant. 922.

tenant must not dispute title of. 925.

LEASE; see FRAUDS, STATUTE AGAINST.

if for more than three years, must be in writing. 1016.

LEGACY;

an action will not lie for, before executor has assented. 1003.

LEGAL OBLIGATION;

assumpsit will lie for a breach of duty arising from. 3.
legal title, plaintiff in ejectment must have. 828.

LEGAL PROCESS;

payments under, cannot be recovered back. 64.
unless the process be abused. 65.

LEGATEE;

may be a witness to a will, but he thereby forfeits his legacy. 1520.
is a good witness for the defendants in an action against the executors. 1007.

LEVANCY AND COUCHANCY;

plea of in replevin, when bad. 1336.

LIBEL; see SLANDER.

definition of. 1360.

a justice may issue a warrant to apprehend a party charged with publishing. *Id.* n.

LIBELLOUS;

prices of libellous prints or books cannot be recovered. 22.

LIBERUM TENEMENTUM;

rules for pleading, in trespass. 1447.
what is admitted by such plea. 1448;

LICENSE;

when an answer to an action for obstructing lights. 560.
for obstructing a watercourse, 568.
from the crown, will enable an alien enemy to trade with this country. 1127. 1201.
construction of. 1202.
when a good defence in trespass to real property. 1452.
marriage by. 1457. 1460.

LIEN;

of a carrier. 528. of a stage coach proprietor on luggage. 540.
should be specially pleaded. 1495.
who have a general lien. *Id.*
who, a particular lien. 1496.
the party claiming must be in possession. 1497.
where a party takes warrant from a factor. *Id.*
or takes goods in pledge from a broker. 1498.
what operates as a waiver of. *Id.*
not destroyed though the claim be barred by the statute of limitations. 1499.

LIFE;

presumption of the duration of. 932.
insurance upon. 1228.
party effecting insurance upon, must have a pecuniary interest in. 1229.

LIGHTS;

when case lies for obstruction of. 558.

LIMITATIONS;

1. In the recovery of rent. 796.
as to time of making a distress. 806.
2. Statute of, 21 Jac. I, c. 16, 1240.
to what cases it extends. 1241.
when it begins to run. 1242. in respect of bills, or notes. 1246. where any of the parties is abroad. 1247.
in case of mutual accounts. 1249.
3. Issuing of process to avoid the statute. 1251.
what acknowledgment will avoid it. 1253.
4. The 9 Geo. IV, c. 14, 1256.
effect of this act; what promise will avoid it. 1258.
part payment on account is not affected thereby. 1265.
by and to whom the promise must be made within this act. 1271.
5. How the statute must be pleaded. 1272, *et seq.*
evidence. 1275.
6. Of actions in respect of real property. 1275.
7. Of actions upon specialties. 1284.

LODGINGS;

letting, is not a breach of covenant not to let, set, assign, &c. 626.
notice to quit, what sufficient. 869.

LOSS; see INSURANCE; AVERAGE

by perils of the sea. 1155.
by fire. 1158. by capture. *Id.* by arrests and detention of princes. 1161,
by barratry. 1169.
what constitutes a total loss. 1165.
on a general or particular average, how to be calculated. 1177. 1179.

LOST BILLS; see BILLS OF EXCHANGE. 10; GROSS NEGLIGENCE.

right of the finder and transferee of. 464.
the loser should give immediate notice. 467.
remedy of the loser. 469. *et seq.*
a promise to pay is not binding. 470.

M.**MACHINERY; see UTENSILS.**

when privileged from distress. 797.

MALA PROHIBITA and MALA IN SE;

distinction between, exploded. 7.

MALICE; see MALICIOUS PROSECUTION.

is a question for the jury. 1291. in a legal sense, what is. 1350. *n.* 1396.
when necessary to be proved in an action for slander or a libel. 1396.

MALICIOUS PROSECUTION AND ARREST;

when an action for, will lie. 1267. 1269.
to support such action, there must be malice and want of probable cause. 1290.
the former suit must have been determined. 1294.
the declaration and pleadings. 1295.
evidence. 1298.

MALICIOUS TRESPASS;

costs, in actions for. 1321.

MARRIAGE;

assumpsit is the proper remedy for a breach of promise of. 4.
covenants in restraint of, are void. 635.
when it will discharge a covenant. 655.
agreements in consideration of, must be in writing. 1639.
operation of on wife's property. 1062.
proof of, in an action for crim. con. 1456.
mode of celebrating, under the new act. 1459.

MARRIED WOMAN;

when liable on her promise. 34. 35.
when she may become a bankrupt. 208. *n.*
cannot bind herself or husband by signing a bill or note. 342.
cannot make a will, 1514.

MASTER;

not bound to provide medical attendance for servant. 88.
when liable for goods sold to servant. 97.
when case lies against, for negligence of servant. 546. 586.
whether owner or hirer of post horses is the master of the driver? *Quære.* 588.
it seems that it is a question for the jury. 589.
not liable for wilful trespass of servant. 590. 1444.
when liable in trespass for acts of servant, 1404. 1443.

MATERIALS; see WORK AND LABOR.**MEDICINE; see APOTHECARY; SURGEON.****MEMORANDUM;**

effect of, on a bill or note. 373.
what is a sufficient within sec. 4. of the statute of frauds. 1046.
what is a sufficient, within sec. 17. 1059.
in a policy of insurance. 1146.

MENTAL INCAPACITY;

persons laboring under, cannot bind themselves by signing a bill or note. 844.
or by entering into a covenant. 635.

MERCHANT'S ACCOUNTS;

what constitute, within the statute of limitations. 1249.

MESNE PROFITS;

trespass lies for. 949.
pleadings and evidence in. 951.
damages and costs. 953.

MISREPRESENTATION; see FRAUDULENT.

will avoid a policy of insurance, when. 1203. 1230. 1233.

MISTAKE;

money paid under, when recoverable. 55;

MONEY HAD AND RECEIVED; see ASSUMPSIT, 4.

when it will lie in general. 45.
money paid under a mistake of facts or of law, when recoverable. 55.

MONEY PAID; see ASSUMPSIT, 5.

when an action for, will lie in general. 69.

MORAL OBLIGATION;

when a sufficient consideration to support a promise. 34.

MUTUAL PROMISES; see COVENANTS.

rules respecting in pleading. 117. 684.

N.

NECESSARIES; see INFANT; HUSBAND AND WIFE.

husband is in general liable for, when supplied to his wife. 1090, *et seq.*
unless he pays her a suitable allowance, or she has committed adultery, or deserted him
without cause. 1095. 1098.

NEGLIGENCE; see SURGEONS; GROSS NEGLIGENCE.

not a good defence in an action on an attorney's bill. 192.
liability of attorneys for. 196. 201.

NEW ASSIGNMENT.

nature of. 1422. when necessary. 1424. 1426.
in trespass to personal property. 1425. to real property. 1426.
when plaintiff may traverse and new assign. 1427.
will not avail, if the excess be justifiable. 1429.

NEW RULES;

as to pleadings in assumpsit. 126.
do not apply to replications. 161.
have made no alteration as to effect of payment into court. 174.

NEWSPAPER;

charge for printing, cannot be enforced, if the provisions of the statute have not been
complied with. 10.
how printing and publishing may be proved in an action for a libel. 1295.

NIL HABUIT IN TENEMENTIS;

not a good plea, generally, in covenant by a landlord. 696.
nor in debt. 723.
nor to an avowry or cognizance in replevin. 1335.

NON EST FACTUM;

what it puts in issue in covenant. 695, 6.
what it puts in issue in debt on bond. 767.

NONSUIT;

a judge cannot nonsuit, without the consent of the plaintiff. 1308.
when a motion for entering a, cannot be made. *Id.*

NOTE IN WRITING; see MEMORANDUM.

NOTICE;

1. Vendee of goods may set up inferiority as a defence to an action, without giving. 95
when it must be averred in the declaration. 122.
- 2 Of an act of bankruptcy, what is sufficient. 277.

NOTICE, continued.

- of matter intended to be disputed in actions by or against assignees. 304.
 - 3. Of the dishonor of a bill of exchange, when and how to be given. 443. *et seq.* 1531.
proof of. 448.
by whom it should be given. 449. to whom. 450.
when it need not be given. 451, *et seq.*
what will dispense with proof of. 456.
 - 4. In office of a carrier, nature and effect of. 419.
 - 5. To quit, what sufficient to sustain an action for double value. 728.
when given to a landlord, the tenant is liable to double rent for holding over. 729.
 - 6. Of sale of distress, form of. 810.
 - 7. To quit, when it must be given before ejectment. 857.
there is no distinction in that respect between houses and lands. 861.
in case of a weekly tenancy. 862.
form of notice to quit. 863.
by whom it should be given. 865.
to whom it should be given. 867.
how it should be served. 868.
at what time it should expire. *Id.*
in case of lodgings. 869.
period of, may be controlled by custom. *Id.*
waiver of, what will amount to. 873.
when not necessary. 875.
 - 8. To appear, in ejectment. 886.
 - 9. Must be given by a tenant to landlord when served with a declaration in ejectment. 905.
 - 10. Of trial in ejectment. 911.
in case of proceedings under 1 G. IV, c. 87, pp. 918. 920.
 - 11. On breach of warranty of a horse. 1506.
- NUISANCE;**
case lies for. 555. what constitutes. *Id.*
when a landlord is liable for. 557.
a public company is liable to an action for. *Id.*

O.

- OBLIGOR; see Bond.**
only liable for the amount of the penalty in the bond, and costs. 740.
- OFFICERS;**
when trespass for false imprisonment will lie against public. 1434.
- OPERATION OF LAW;**
covenants discharged by. 651.
- ORDER AND DISPOSITION OF BANKRUPT; see BANKRUPTCY.**
goods in, will pass to assignees. 244.
goods of others in, with consent of true owner. 251.
- OVERDUE BILL;**
transferee of, has only the same rights as the transferor. 408. 411.
- OVERSEERS;**
under a moral obligation to provide for the poor. 26.
when liable for goods supplied for parish. 97.
- OWNER; see BANKRUPTCY.**
goods of others in possession of bankrupt with consent of, passes to assignees. 246. 251, *et seq.*
- OYER; see Bond.**
when defendant craves. 767.

P.

PARENT;

- when liable for necessaries supplied to child. 142.
- not obliged to educate his children. 143.

PARENT; continued.

liability of, on account of illegitimate children. 144.
may maintain trespass for seduction of daughter. 1462.

PARI DELICTO;

parties in, have no remedy. 67.

PARTICULARS;

of demand, not admitted by payment into court. 174.
not to be considered as incorporated in the declaration. 175.
of breaches of covenant, must be delivered in ejectment. 917.
when the court will order a delivery of. 1301.
a general rule of the courts respecting. 1301.
copy of, should be annexed to the record. *Id.*
should contain the items of demand, and the transactions from which they arose. 1301.
defendant not entitled to on a count for a bill of exchange. *Id.*
a mistake in, not calculated to mislead, immaterial. *Id.* 1301.
a second particular, not delivered under a judge's order, is immaterial. 1301.
the plaintiff is in general bound by. 1301.
but he may recover more, if it appears from the defendant's evidence to be due. 1301.
the plaintiff should state in, the precise sum which he seeks to recover. *Id.*
admissible for the defendant in assumpsit, to prove payments for which credit is given,
but not in debt, without a plea of payment. *Id.*

PARTNERS; see INFANT; BILLS OF EXCHANGE.

joinder of, in assumpsit. 104.
partnership payments in case of bankruptcy, when valid. 272.
liability of, on bills and notes. 352.
when a bill signed by one, will bind the others. 354. 356.
one cannot sue another. 357.
should give notice on dissolution of partnership. 358.

PAST COHABITATION;

when sufficient to support a promise. 35.
a good consideration for a bond. 635. *n.*
but future cohabitation is not. *Id.*

PASSENGERS; see CARRIER, 7.**PAWNBROKER;**

secret partnership in business of, prohibited. 14.

PAYEE; see BILLS OF EXCHANGE;

should be described in a bill or note. 367.

PAYMENT;

1. Of the debt of another, when assumpsit will lie for. 37. 72.
if voluntarily made, though under a threat, cannot be recovered. 65.
must be specially pleaded. 145.
plea of, may be taken distributively. *Id.*
to whom it should be made. 145.
mode of. 147. what sufficient. *Id.* by check or bill. *Id.*
2. Appropriation of. 149.
where there are legal and illegal, and partnership demands. 150.
where there is a guarantee. 151.
3. Of money into court. 171. under the carrier's act. 521. 536.
in covenant. 700.
when tender has been made, and when not. *Id.*
under the statute 3 & 4 W. IV, c. 42, s. 21, p. 172.
in what cases allowed, and how to be pleaded. *Id.* 173.
effect of; admits the contract. 174.
does not admit particulars of demand. *Id.*
new rules have made no alteration in effect of.
4. What payments to and by a bankrupt are protected. 268, *et seq.*
5. Plea of, in debt on bond. 768.
6. Effect of, not taken away by 9 G. IV, c. 141. 257.
part payment on account will obviate that statute. 1265.
by one of several joint debtors, will avoid it. 1266.
but not after their joint liability has ceased. 1269.
what amounts to. 1270.
7. In bar to an avowry in replevin. 1336.

PENALTY;

implies a prohibition, and a contract to do an act which subjects a party to a penalty is void. 7.

obligor in a bond liable only to the amount of the. 740.

PERFORMANCE;

a good plea in covenant. 698.

plea of, in an action on a bond. 768.

PERSONAL;

covenant, what. 618.

representatives are bound when named in a covenant. 680.

trespass lies for injuries to, property. 1405. 1408.

PETITIONING CREDITOR;

of bankrupt, to give a bond to the lord chancellor, to prosecute the commission. 215.

debt of what shall be sufficient to support a fiat. 235. 238.

who may be. 236, *et seq.*

PEW;

when trespass will lie for breaking. 1441.

PHYSICIAN;

cannot sue for fees. 83.

PLAINT; see REPLEVIN.

removal of, from an inferior to a superior court. 1327.

PLEADINGS; see ASSUMPSIT; DEBT; COVENANT.

non assumpsit. 126. 127.

in actions by assignees of bankrupt. 295.

in an action on a bill of exchange. 494.

in actions against carriers. 536.

in an action on the case. 599.

in debt on bond. 767.

on bail bond. 779.

in actions by executors. 1007.

in actions against executors. 1005.

in actions on policies of insurance. 1220.

under the statute of limitations. 1272.

in an action for malicious prosecution. 1295.

in replevin. 1329.

in an action for slander, or a libel. 1389.

in trespass for an assault and battery. 1413.

in trespass for false imprisonment. 1437.

in trespass for injuries to real property. 1447.

in trover. 1492. in an action on the warranty of a horse. 1510.

PLEDGES; see REPLEVIN.**PLENE ADMINISTRAVIT;**

replication to a plea of. 1006.

what evidence may be given under. 1007.

POLICY OF INSURANCE; see INSURANCE.**POLL; see ELECTION.****POSSESSION; see ENTRY; ADVERSE POSSESSION; TRESPASS; TROVER.**

of co-parcener, joint tenant, or tenant in common, is not to be deemed that of their companion. 838.

not adverse, when the title of the claimant is acknowledged. 839.

when vacant, how to proceed in ejectment. 854.

when demand of, must be made before ejectment. 862.

when writ of, may be immediately issued in ejectment. 943.

plaintiff in trespass for injuries to property must have actual, or right of. 1405. 1439. 1441.

defence of, a sufficient justification in trespass for an assault. 1414.

when sufficient to maintain trover. 1476.

POUND; see DISTRESS.

cattle put in, must be supplied with food by distrainer. 810.

remedy for breach of. 814.

PRACTICE;

in trials at *nisi prius*. 1302.

PRACTICE, continued.

hearing counsel. *Id.*
 amending the record. 1309. 1312.
 judgment according to the right and justice of the case. 1314.
 judge's certificate respecting costs. 1315, 1316.
 speedy execution. 1321.
 in replevin. 1342.

PREMIUM;

paid under a void indenture, not recoverable. 68.
 for insuring a lottery ticket, recoverable. *Id.*
 insured entitled to a return of, when no risk has been run. 1939.

PRESENTMENT OF A BILL OR NOTE; see BILLS OF EXCHANGE.

for acceptance, within what time to be made. 416.
 for payment, should be made within a reasonable time. 434.
 and within the usual hours of business. 439.
 when it must be made at a particular place. 440. 442.

PRESUMPTION; see LIFE.**PRINCIPAL; see AGENT.**

when he may sue and be sued upon contracts made by agent. 96. 105.

PRINTING;

charge for, cannot be enforced if done in contravention of the law. 10.

PRIVILEGE;

of attorneys. 193.
 of parliament, in case of bankruptcy. 212.
 of carriers. 528.
 of a married woman from arrest. 1105.

PRIVILEGED COMMUNICATIONS; see SLANDER.

what are in general. 1363.
 any thing said *bona fide* in giving a character of a servant. 1366.
 words used in judicial proceedings. 1369.
 words used by a barrister or a member of parliament. 170.
 criticisms of literary works. 1470.
 plea of, must deny malice. 1392.

PRIVILEGED PUBLICATIONS;

parliamentary proceedings are. 1371.
 so are reports of judicial proceedings in general. 1373.

PRIVITY;

of contract must exist to sustain an action for money had, &c. 51.

PROBABLE CAUSE; see MALICIOUS PROSECUTION.

is a mixed question of law and fact. 1291.

PROBATE; see EXECUTORS.

how to be taken out where there are *bona notabilia*. 963.
 an executor cannot maintain an action before. 972.

PROCESS;

how to be issued to avoid the statute of limitations. 1251.
 wrongful execution of, will subject a party to an action of trespass. 1444.

PROFERT;

allegation of, in a declaration in covenant. 690.

PROFESSIONAL MEN;

compensation to. 88.

PROMISE; see ASSUMPSIT; CONTRACT; CONSIDERATION.

by husband to pay wife's debt contracted before marriage, not binding. 37.
 to do a thing without a reward, when binding. 38.
 if entire, and part be void, it is void altogether. 42.
 to pay a stranger to the consideration, void. *Id.*
 by an infant after age, to be valid must be in writing. 138. 340.
 so must that of a bankrupt to pay a debt discharged by certificate. 328.
 so must that of an executor to pay debts of testator. 1022.
 to answer for the debt of another must be in writing. 1023.
 to pay the debt of an infant need not be in writing. 1024.
 if entire, and void in part for not being in writing, it is altogether void. 1030.
 need not be in writing if the third party be not liable. 1025. 1031.
 must be in writing, to obviate the statute of limitations. 1256. 1258.

- PROMISSORY NOTE**; see **BILLS OF EXCHANGE**
properties of. 337.
- PROSECUTION**; see **MALICIOUS**.
- PROTECTED TRANSACTIONS**; see **BANKRUPTCY**.
dealings with a trader two months before his bankruptcy are. 267, *et seq.*
- PROTEST**; see **FOREIGN BILL**.
- PUBLICATION**;
proof of, in an action for a libel. 1393. 1395.
- PUBLIC POLICY**;
contracts against, are void. 23.
- PUFFING**; see **AUCTIONS**.

Q.

- QUANTUM VALEBANT**;
when a vendee of goods is liable for. 93 to 96.
- QUIET ENJOYMENT**; see **COVENANT**.
covenant for, extends only to disturbance under a lawful title. 622.
what constitutes a breach of such covenant. 624.

R.

- RATIFICATION**;
of a contract by an infant after age. 138.
- REAL PROPERTY**;
limitation of actions in respect of. 1275.
no land to be recovered but within twenty years after right of action has accrued. 1276.
when trespass will lie for an injury to. 1458.
- RECEIVING HOUSE**; see **CARRIER**.
- RECITAL**; see **CONDITION**; **BOND**.
- RECOGNIZANCE**;
definition of; ranks above specialty debts. 980.
- REGISTER**;
examined copy of, is evidence of marriage. 1457.
- REINSURANCE**; see **INSURANCE**.
- RELEASE**;
will discharge a covenant. 652. 654.
must be specially pleaded. 699.
- RENT**;
when debt lies for. 716.
when there may be an apportionment of. 718. 719.
when not. 725.
limitations in recovery of. 726. 1283.
double, when recoverable. 729.
is the highest remedy known to the law; taking bond or other security for, will not extinguish it. 793.
reserved by specialty, not barred by the statute of limitations until after ten years. 1285.
- REPAIR**; see **COVENANT**.
covenant to, not broken by ordinary decay. 616. or by making an alteration. 617.
- REPLEVIN**;
when an action of, will lie. 1323.
of the mode of proceeding in. 1325.
the declaration. 1328. the pleadings. 1329.
avowries and cognizances. 1331.
of the plaintiff's replication to an avowry or cognizance. 1335.
evidence. 1347. judgment. 1339.
costs; practice. 1341.
writs of replevin and second deliverance. 1343.
proceedings on the replevin bond. 1344. 1346.
proceedings against the sheriff for taking insufficient pledges. 1347.

REPLICATIONS; see DE INJURIA; NEW RULES.

to a plea of infancy. 138.
 of *nil debet* to a set off. 161.
 to a plea of tender. 169.
 in assumpsit. 176.

REPUTED OWNERSHIP; see BANKRUPTCY.

what constitutes. 246, *et seq.*

REQUEST;

necessary, to support a promise, when the consideration is past. 36. 38.
 and where the defendant has derived no benefit from the plaintiff's acts. 37.
 of defendant, must be express or implied in an action for money paid. 70, 71.
 when it must be averred in the declaration. 1201.

RESCUE;

definition of; remedy for. 814.

RESPONDENTIA; see BOTTOMRY.**RESTITUTION;**

when the court will award writ of. 944.

REVENUE; see EXCISE.

non-observance of regulations of, without fraud, will not avoid a contract. 8. 18.
 contracts in contravention of, when void. 16.

REVERSIONER;

may bring an action for obstruction of lights. 560.
 or for any injury to his interests. 585.

REVOCATION, see WILLS.**REWARD;**

offering, by advertisement, will support assumpsit. 29.
 carrier without liability of. 527.

RIENS IN ARRERE;

a bad plea in covenant. 695.
 demurrable in debt. 723.

RISK; see CARRIER.

commencement and termination of, in policy of insurance. 1143. 1145.
 if none has been run, there must be a return of premium. 1209.

RUNNING DOWN;

vessels at sea, case lies for. 542.

S.

SALE; see AUCTION.

of public offices, illegal.
 of a distress, how be made. 810.
 when property in goods passes by. 1470.

SCIRE FACIAS;

pleadings in debt on. 716.

SCRIVENER;

definition of; may be a bankrupt. 204.

SEAMEN;

not entitled to extra wages for great exertions. 39.

SEAWORTHINESS; see INSURANCE.

what constitutes. 1189.

SECURITY; see COSTS.

defendant must give security for costs, in proceedings under 1 G. IV, c. 87, 919.

SEDUCTION;

trespass or case lies for. 1462.

SEPARATE ESTATE;

how a wife may have. 1086.

SERVANT; see MASTER.

contract of, hiring on *Sunday*, valid. 16.
 general hiring; month's warning, 86.
 leaving service before end of year, forfeits wages. 87.
 unless by mutual consent. *Id.*

SERVANTS, continued.

a master may maintain trespass for seduction of. 1462.
possession of, not sufficient to maintain trover. 1476.
is liable in trover for a conversion by him. 1481.
employed to sell a horse, has authority to warrant. 1505.

SERVICE;

of a declaration in ejectment, what sufficient. 889.
where the tenant keeps out of the way. 891. 893.
when an acknowledgement, by tenant, of receipt of declaration is sufficient. 892.
where no person resides on the premises. 894.
where the tenant is abroad. 896.
where there are several tenants. 897.
may be good for part only. 898.
affidavit of. 899.

SET OFF;

1. What debts may be, statutes relating to. 152.
must be specially pleaded. 154. 161.
mutual debts may be. *Id.*
judgment debts; attorney's bill may be. 155.
so may goods bargained and sold; penalties. 156.
but a claim arising out of a guarantee cannot be. 154.
the demand must be due in the same right. 156.
when allowed in bankruptcy. 159.
when an unliquidated demand may be. 160.
plea of may be taken distributively. 161.
2. In an action by assignees of a bankrupt. 295.
3. In covenant. 699.
4. The statute of limitations applies to. 1257.
5. May be pleaded in replevin. 1336.

SEVERAL; see JOINT and SEVERAL.**SHERIFF;**

may take a bail-bond, when. 771.
must give full and actual possession in ejectment. 945.
proceedings against, for taking insufficient pledges in replevin. 1347.
extent of his liability. 1349.
is liable in trover for seizing the goods of a bankrupt. 1479.
not liable in trespass for executing a writ though irregularly sued out. 1473.

SHIPS;

payment for repairing. 78.
who is liable. 83.
missing, when presumed to be lost. 1156.

SIGNING; see WILL.**SIMONY;**

definition of. 755.
bonds, in advancement of, void. 755. 757.

SLANDER; see LIBEL.

case lies for. 1350.
words actionable in themselves. *Id.* 1356.
words spoken in respect of office, &c. 1355.
words actionable in respect of special damage. 1357.
of title; words tending to disinherit. 1359.
scandalum magnatum. 1362.
privileged communications. 1363. 1364. See **PRIVILEGED.**
privileged publications. 1371.
disclosing the name of the author of the. 1376.
the declaration. 1377.
the pleadings. 1389.
evidence. 1393. 1398.
costs. 1400.

SMUGGLING; see REVENUE; INSURANCE.

when persons engaged in, cannot enforce contracts. 17.

SPECIAL DAMAGE;

words causing, are actionable. 1357.
special property sufficient to maintain trover. 1474.

SPECIALTIES;

limitations of actions upon. 1284.

SPECIFIC PURPOSE;

goods in possession of bankrupt for, will not pass to assignees. 262.

SPIRITS;

contracts for sale of, in quantities amounting to less than 20s., cannot be enforced. 81.
unless when supplied to guests. 10.
securities for price of. 9.

STAGE COACHES;

owners of, responsible for goods of passengers. 510.
drivers of, liable for gross negligence. 527.
taking places in. 540.

STAKE-HOLDER;

when money had and received will lie against. 48.
when not. 62.

STAMP;

on bills or notes, and checks, statutes relating to. 376, *et seq.*
construction of act. 345.
effect of want of. 387.
on bonds. 733.
what bonds are exempt from stamp duty. 735.
on policies of insurance. 1147.
insufficiency of may be objected to without pleading it. 387.

STAY PROCEEDINGS; see COSTS.

when the court will, in ejectment. 911.
until payment of rent and costs under 4 G. II, c. 28. p. 914.
until payment of mortgage-money, under 7 G. II, c. 20. p. 915.
until delivery of particulars of breaches. 917.

STOCKS;

foreign funds not within stock-jobbing act. 81.

STOLEN PROPERTY;

when trover will lie for. 1469.

STOPPAGE IN TRANSITU;

when it may be exercised; effect of. 1472.

STRANDING; see INSURANCE.

what constitutes. 1173.

SUNDAY;

what contracts made on may, and what cannot, be enforced. 14.
a bill due on becomes payable on Saturday. 439. 447.

SUPRA PROTEST; see ACCEPTANCE.

SURETY;

1. May prove under a fiat in bankruptcy. 321.
who is, within the bankrupt act. 329.
what claims of, are barred by certificate. *Id.*
2. In a bond, liability of. 744.
to a party in office; tax collector. 747.
3. Contribution, among sureties. 750.
4. In a replevin bond, when discharged. 1345.
extent of liability of. 1346.

SURGEONS;

must be licensed, when. 84.
when entitled to recover for medicines. *Id.*
liable for negligence. 85.

SURRENDER; see TRUSTEES.

of a title in lands must be in writing; what is sufficient. 1012.

T.

TENANCY; see NOTICE.

from year to year, what constitutes. 857.
where it exists, six months' notice to quit must be given before ejectment. *Id.* 861.

TENANCY, continued.

- when presumption of a yearly tenancy may be rebutted. 860.
- at will, what is. 861.
- rules for ascertaining commencement of. 870.
- proceedings under 1 G. IV, c. 87, against a tenant who holds over after expiration of. 918.

TENANTS; see LANDLORD.

- weekly, holding over, not liable for double value. 727.
- when liable for double rent. 729.
- in common, should make several distresses. 789.
- by the courtesy may distrain. *Id.*
- must not dispute title of landlord. 925.
- but may show that it has expired. 927.

TENDER;

- when available as a defence. 161.
- at what time it must be made. 162.
- by and to whom made. 163.
- in what specie, and to what amount. 164.
- bank notes, when a good. 165.
- of a larger sum, when good. *Id.*
- how it should be made. 166.
- when the conduct of the creditor will dispense with. 166. 167.
- must be unconditional. 167.
- how to be pleaded. 168, 169.
- replication to plea of. 169.
- may set up a subsequent demand. 170.
- by whom demand should be made. *Id.*
- payment into court after. 171.
- when a good plea in covenant. 699.
- of rent, will prevent distress. 792.

TORT;

- when a party may waive, and sue in assumpsit. 4. 45.
- joint tort-feasors may be sued jointly or severally. 591.
- when a party may waive the tort and sue in case. 1402.

TRADE; see INFANT; COVENANT.

- contracts in general restraint of, are void. 638.
- but contracts in partial restraint of, are not. 639.
- things privileged from distress in favor of. 795.

TRADER; see BANKRUPTCY.

- what constitutes, within the meaning of the bankrupt laws. 905.

TRANSFER; see INDORSEMENT; BILLS OF EXCHANGE, &c.

- of a bill or note by delivery. 399.
- of an over due bill. 408. check. 411.
- after payment. 412.
- of a forged bill; rights of transferee. 414.

TRANSITU; see STOPPAGE.**TREATING ACT;**

- price of refreshments furnished to voters cannot be recovered. 11.

TREES;

- property in. 1450.

TRESPASS; see MISFEASANCE.

1. By assignees of a bankrupt. 290.
2. When a concurrent remedy with case. 547.
3. When it lies in general. 1401. 1418.
4. When it lies for injuries to personal property. 1405.
5. For an assault and battery. 1409. See **BATTERY**.
the declaration. 1412. the pleadings. 1413. 1573.
replication, 1418. new assignment. 1429. damages. 1430.
6. For false imprisonment. 1432.
7. When it lies for injuries to real property. 1438.
the declaration. 1446. the pleadings, 1447.
8. For crim. con. 1455.
9. For seduction. 1462.

TRESPASSER, *ab initio*.

person distraining for rent, or poor's rate, shall not be deemed, on account of irregularity. 816.

when a man abuses an authority derived from the law, he becomes a, 1430. 1445.

TROVER;

origin of, and when it will lie in general. 1465.

the plaintiff must have a right of possession, and a right of property. 1468.

but absolute property, without possession, is sufficient. 1467.

when it will lie for goods in progress of manufacture, 1472.

when a special property is sufficient. 1474.

possession alone is sufficient, against a wrong doer. 1476.

what constitutes a conversion. 1477.

a demand and refusal is evidence of a conversion. 1482.

of the parties to this action. 1487.

by assignees of a bankrupt. 282. 1470.

on a bill of exchange. 499.

will lie against a carrier, when. 530.

will lie where trespass cannot be maintained. 1475.

the declaration. 1490. the pleadings. 1492.

evidence and damages. 1500.

TRUSTEES; see EJECTMENT, 12.

may maintain ejectment, when legal estate vests in. 848.

when a surrender of their estate will be presumed, to enable the *cestui que trust* to maintain ejectment. 852.

U.

UNDERWRITER; see INSURANCE.

opinion of, as to materiality of a fact concealed, not admissible in evidence. 1206.

is a competent witness for another underwriter who has signed the same policy. 1227.

USE AND OCCUPATION:

when debt lies for. 718.

USURY;

what constitutes. 481, *et seq.*

bills tainted with, to be deemed as given for an illegal consideration. *Id.*

what bills are exempt from usury laws. 484.

UTENSILS;

when they will pass to the assignees of a bankrupt. 255.

V.

VACANT; see POSSESSION.

VALUE RECEIVED;

a bill or note need not import to be for. 372.

when tenants are liable for double value. 726.

VALUED AND OPEN POLICIES. 1152.

VOID; see ILLEGAL; CONTRACT; COVENANT; BOND.

W.

WAGER;

courts will not try action on, if contrary to public policy. 26.

illegal, what. *Id.*

when recoverable from the stake-holder. 48.

when money paid on, cannot be recovered. 67.

relating to the price of foreign funds, not illegal. 54.

WAGERING POLICIES;

are illegal. 1133. 1228.

WAGES; see SERVANTS.

WAIVER;

of forfeiture for a breach of covenant, what. 632. 929.

of double value, acceptance of single rent is. 727.

of notice to quit, what will amount to. 873.

acceptance of rent. *Id.* serving a second notice after the expiration of the first. 874.

WALLS;

property in party walls. 1451.

WARRANTY;

of goods sold and delivered. 95.

what constitutes, in a policy of insurance. 1181. See **INSURANCE**.

of horses, remedy for a breach of. 1508.

what constitutes a breach of a general. 1504.

of the proper course to pursue in case of a breach of. 1506.

WASTE LANDS;

what possession of will be deemed adverse, so as to confer a title against the lord. 836.

adjoining a high road, ownership of. 1450.

WATER;

carriers by, liability of. 511. 515. See **CARRIER**.

WATERCOURSE;

when case will lie for a diversion or obstruction of. 564, *et seq.*

WAY, RIGHT OF;

statutory provisions respecting. 571.

decisions on the construction of the statutes. 573.

by grant, what constitutes. 578.

extent of. 580.

of necessity; by operation of law. 581.

is extinguished by unity of possession. 583.

in an action for obstruction of, the *termini* should be stated in the declaration. 583.

plea of, in trespass. 1451.

WEEKLY TENANT;

not liable to double value for holding over, 727. 788.

need not give a week's notice to quit, unless there be a contract or usage to that effect. 862.

WIFE; see HUSBAND; MARRIED WOMAN.**WILLS;**

of the nature and requisites of. 1511.

who may make. 1513.

what property passes by a. 1514.

signing and attestation under the statute of frauds. 1515.

under the new act. 1517.

who might be witnesses under the statute of frauds. 1518.

competency of witnesses under the new act. 1521.

revocation of, under the statute of frauds. 1522.

under the new act. 1527.

proof of, 1229.

the will's act. 7 W. IV, & 1 Vic c. 25. 1532.

WITNESS; see EVIDENCE, *passim*.

not entitled to compensation for loss of time. 40.

unless he be a foreigner. *Id.* n.

who may be, in bankruptcy actions. 311.

in an action on a bill of exchange. 500.

in an action for diverting a watercourse. 570.

case lies against, for not obeying a subpoena. 545.

competency of, pursuant to 3 & 4 W. IV, c. 42, s. 26, 501. 1541.

who may be, in ejectment. 941.

who may be, in replevin. 1338.

to a will. 1518 to 1522.

WORDS; see SLANDER.**WORK AND LABOR;**

assumpsit will lie for. 77.

deviation from special contract, rule respecting. 78.

when of an inferior description. *Id.* finding materials. *Id.* new work. 80. extra. *Id.*

who may sue and be sued for. 81.

4

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